No. 79-176

In the

Supreme Court of the United States

OCTOBER TERM, 1979

BETTY OSWALD, on her own behalf and behalf of others similarly situated, and PHIL MILLER and EILEEN MILLER, on their behalf and on behalf of others similarly situated and SKOKIE CENTRAL TRADITIONAL CHURCH, *Petitioners,*

vs.

GENERAL MOTORS CORPORATION, *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

CHARLES A. BOYLE
SCHEELE, SERKLAND AND BOYLE
77 West Washington Street
Chicago, IL 60602
(312) 368-1060
Plaintiffs' Liaison Counsel and Counsel for Plaintiffs-Objectors

Of Counsel:
LAWRENCE A. WALNER
WILLIAM J. HARTE
FRANCIS E. GOODMAN
ABRAHAM N. GOLDMAN

The Scheffer Press, Inc.—(312) 263-6850

SUBJECT INDEX

TABLE OF AUTHORITIES

FEDERAL CASES

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1979

IN RE:

GENERAL MOTORS CORPORATION ENGINE INTERCHANGE LITIGATION,

Petition of Plaintiffs-Objectors Betty Oswald, Eileen Miller, Phil Miller and Skokie Central Traditional Congregation.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the decisions of the United States Court of Appeals for the Seventh Circuit rendered in the above-entitled case on February 26, 1979, and July 26, 1979.

CITATIONS TO OPINIONS BELOW

The first decision of the United States Court of Appeals for the Seventh Circuit is reported at 594 F.2d 1106. It set forth in an Appendix filed contemporaneously with this Petition. The second decision is an unreported decision upon petitioners, motion to stay the force of the district court's order subsequent to remand of the first decision. It is included in a Supplemental Appendix to this Petition.

JURISDICTION

The judgment of the Circuit Court of Appeals in the first decision was entered February 26, 1979. A timely petition for rehearing was filed and was denied on May 4, 1979. The second decision was entered on July 26, 1979. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional provisions involved are the Free Speech Clause of the First Amendment and the Due Process Clause of the Fifth Amendment. Also involved is Rule 23 of the Federal Rules of Civil Procedure 23(e). It reads in pertinent part:

> (e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court. . . .

QUESTIONS PRESENTED

1. Will communication of the disapproved settlement offer deprive class members of adequate representation of counsel, violating their constitutional rights to due process under the Fifth Amendment?

2. Does the refusal of the district court to allow petitioners' counsel to communicate with the class members explaining their objections to the disapproved settlement offer violate the constitutional rights of class members and their counsel under the First and Fifth Amendments?

3. Does communication of the disapproved settlement to individual class members violate the provisions of Rule 23(e) of the Federal Rules of Civil Procedure?

STATEMENT

This is a class action brought against defendant General Motors Corporation ("GM") on behalf of purchasers of 1977 Oldsmobile automobiles who received such cars equipped, without their knowledge or consent, with drivetrains, engines, and other component parts produced by other divisions of GM. The trial court certified plaintiffs' class as to the issue of liability only under the Magnuson-Moss Warranty Act, 15 U.S.C.A. Sections 2301-12 (1977 Supp.). The trial court later certified for settlement purposes only a sub-class consisting of only those class members who entered into written purchase orders for the 1977 Oldsmobile on or before April 10, 1977.

On December 19, 1977, GM and several Attorneys General from various (formerly 44 and now 47) states tendered a proposed settlement to the district court, suggesting that it be approved so as to resolve the claims of the sub-class members as to the alleged substitution of drivetrains, engines and other component parts normally placed within Chevrolets and Chevettes. The district court conducted a hearing on objections to the proposed settlement advanced by certain plaintiffs-petitioners here and their counsel. On July 17, 1978, the district court entered findings of fact and conclusions of law regarding the sub-class settlement and an order approving the sub-class settlement. (Jointly set forth in an Appendix to this Petition).

On appeal the Seventh Circuit unanimously reversed the order of the district court approving the sub-class settlement. Notwithstanding reversal of the district court's approval, section VI of the Opinion, "Directions on Remand", authorized the trial court to allow General Motors to communicate the terms of the disapproved settlement offer to the individual members of the sub-class, and left it

to the discretion of the trial court whether successful plaintiffs' counsel would be permitted to convey their opinion as to the adequacy of the offer of settlement in their own communication. (594 F.2d, at 1137-1141).

In due course, plaintiffs filed a petition for rehearing in the Court of Appeals directed at Point VI of the Opinion. Opposing counsel were ordered to respond to the petition, and it was subsequently denied on May 4, 1979. Efforts to stay the mandate in the Court of Appeals and in this Court were denied.

General Motors, on remand, moved the district court to communicate the settlement offer to sub-class members and to approve a form of notice and release. The motion was brought on for hearing on June 14 and July 5, 1979. Copies of transcripts of these proceedings are included in the Supplemental Appendix. Within the hearing on remand the district court surprisingly insisted that transmissions did not belong in the case and that he was "not adjudicating the transmission issue at all." (Supp. App., 6/14/79, Tr., at 8). The court's attention was then directed to the fact that the release the class members were to execute included all components which covers substituted transmissions, and plaintiffs objected to such inclusion if, indeed, the litigation did not concern transmissions (*Id.*, at 9-13). After extensive colloquy and argument, the district court first concluded: "Since I contended in the beginning that I was not trying any transmission issues, I don't think any release should release rights in connection with a transmission claim." (*Id.*, at 14). The court later relented to GM's argument that the notice could adequately explain the difference (*Id.*, at 15) over the strenuous objection of plaintiff's counsel. (*Id.* at 17-24). The notice to the sub-class includes a release form approved by the

district court. If executed by a sub-class member, it releases GM from all claims relating to the substitution of not only any engine, but also any component part or assembly in any 1977 GM automobile.

The trial court also refused to allow attorneys for the objectors to include a letter with the notice informing the sub-class of their evaluation of the offer. (*Id.*, at 36). It was deemed sufficient to include the name, address and telephone number of one of objecting counsel to respond to inquiries of class members. (*Id.*, at 35-36).

On July 23, 1979, plaintiffs filed a Notice of Appeal from the district courts' order of July 5 approving communication of the settlement offer, and also filed a petition for writ of mandamus seeking to vacate the district court's order. The petition for writ of mandamus was filed due to the uncertainty surrounding Court of Appeals jurisdiction to hear this matter on direct appeal. On July 24, the district court denied plaintiffs' motion to stay transmittal of the offer of settlement pending the disposition of the proceedings in Court of Appeals. Plaintiffs then filed a similar motion in the Court of Appeals for the Seventh Circuit.

The Seventh Circuit granted the motion by order of July 26, 1979, but only in the event GM refused to include two sentences in the notice to the class. (Supp. App.) The District Court, on July 27, 1979, granted GM's motion to include the required changes and GM has now transmitted the disapproved settlement to the class.

REASONS FOR GRANTING THE WRIT

This petition involves fundamental constitutional issues affecting all present and future class actions brought in the federal and state courts, and the continued efficiency of Rule 23 of the Federal Rules of Civil Procedure as a means for private citizens to combine their limited resources to achieve a meaningful litigation posture against large corporate defendants. See *State of Hawaii* v. *Standard Oil Company of California*, 405 U.S. 261, 266 (1972).

1. The Due Process Violation

Class counsel were totally fenced out of the negotiations leading to the settlement in this case. They have no idea how the settlement was arrived at and are therefore unable adequately to advise the class as to the settlement offer. Where absent class members are forced to make binding legal decisions, due process demands that their interests be vigorously represented by counsel. When class counsel, the attorneys appointed to represent the class, have been placed in a position where they cannot adequately represent these class interests, due process is violated. The communication of this offer places class counsel in just such a position.

2. The First Amendment Violation

The only persons with *any* information on the value of the transmission claims are counsel for plaintiff-objectors (and of course GM). The district court has refused to allow objectors' counsel to communicate with class members explaining and evaluating the offer of settlement. This aspect of the trial court's order is a prior restraint on class counsels' speech, in violation of the First Amendment. Given the heavy presumption against the constitutional validity of any prior restraint, *New York Times*

Company v. *United States* 403 U.S. 713 (1971), plaintiffs' position on this issue is irrefutable.

3. Rule 23

Petitioners submit that this case presents this Court with the important and unique question of the communication of a settlement offer which has been disapproved. The resolution of this question by this Court is crucial to insure that the protections of Rule 23(e) are not seriously eroded, and to insure that the class action remains a viable instrument of dispensing justice. The Court of Appeals has determined that the settlement offer involved was negotiated in a highly improper manner, and in probable violation of a court order. Class counsel were totally excluded from the negotiations, depriving class members of the vigorous representation of counsel mandated by Rule 23. In spite of the gross irregularities in the negotiations and the inherent prejudice to the class, the Court of Appeals authorized the district court to consider the advisability of permitting GM to communicate the offer to individual class members. Upon remand, the district court has permitted communication of the "offer" to individual class members. Such communication will allow GM to circumvent the provisions of Rule 23(e), and to fragment the class through piecemeal settlements. This result weakens the position of the class, is contrary to the role of the Court as the ultimate protector of the interests of the class, and will destroy the utility of the class action as an effective litigational device.

I.

COMMUNICATION OF THE DISAPPROVED SETTLEMENT OFFER WILL DEPRIVE THE CLASS MEMBERS OF ADEQUATE REPRESENTATION OF COUNSEL, DENYING THEM DUE PROCESS OF LAW.

There is no doubt that due process requirements apply to class actions. *Hansberry* v. *Lee,* 311 U.S. 32, 61 S. Ct. 115, 85 L. Ed. 22 (1940); *Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950). Due process is an extremely difficult term to define, but everyone shares a "feeling" for what it involves. Due process implies "a conformity with natural and inherent principles of justice." *Holden* v. *Hardy,* 169 U.S. 366, 390, 18 S. Ct. 383, 42 L. Ed. 780 (1898). At the most fundamental level, the essence of due process is fair play. *Galvan* v. *Press,* 347 U.S. 522, 530, 74 S. Ct. 737, 98 L. Ed. 911 (1954).

The settlement offer involved in this case is the product of negotiations between GM and several Attorneys General. The Seventh Circuit unanimously and emphatically denounced the settlement as procedurally offensive. *In Re General Motors Corp. Engine Interchange Litigation,* 594 F.2d 1106 (1979). The Court found that the settlement presented by the Illinois Attorney General was either (1) negotiated without the permission of the other class counsel (in violation of the district court's first pre-trial order), or (2) negotiated by the Attorney General's office in a capacity other than as representative of the class in the federal class action. 594 F.2d 1106, 1126. The Court also found that the trial court's denial of petitioners' requests for discovery into the negotiation process was an abuse of discretion, 594 F.2d 1106, 1131. These unauthorized settlement negotiations and the denial

of discovery have resulted in the total exclusion of petitioners' counsel from the negotiation process.

The Court also decried the abandonment of the prosecution of the claims of post-April 10 class members (594 F.2d, at 1128; criticized the agreed upon compensation of the proponent Attorneys General and private counsel (594 F.2d, at 1129-1131); and finally was "not convinced that the (district) court's conclusion (that the settlement was fair) finds clear support in the record" because 1) the court "apparently misapprehended the nature of the objectors' claims" with respect to the transmission switch, 2) the "failure to apply the ordinary measure of damages for breach of warranty", and 3) the court's refusal to consider the possibility of a recovery of punitive damages. (594 F.2d at 1132, n. 44).

Not only class counsel, but also the district court, the Seventh Circuit and this Court lack the faintest idea how the settlement was rendered. *In re General Motors Engine Interchange Litigation, supra,* 594 F.2d 1106 at n. 36. Class counsel's ability to advise class members about the settlement is foreclosed. Yet GM and the Attorneys General, the very people who fenced class counsel out of the negotiations, force class members to make an important legal decision *now,* at a time when the ability of counsel to give meaningful advice is foreclosed. If such a state of affairs does not violate "inherent principles of justice" and shock the sense of fair play, nothing does.

We submit that it is not enough to state that the notice of offer to settle claims provides an accurate and complete disclosure of the terms of the release, a conclusion, parenthetically, with which we vehemently disagree. Stating what is being released is nothing; stating what *the*

value of what is being released is the only way a class member can make a rational decision. Any rational person would expect that *some* consideration be given *the value* of what is being released as a condition of communicating the offer. This simply has not been done in this case.

A class action has the power to bind class members who have very limited knowledge of the suit. When absent parties may be bound by litigation, the Court must stringently protect the interests of the absent class members. The protection of those absent class members must depend in large measure on the skillful representation of class counsel. In such cases, adequacy of representation takes on a Constitutional dimension as a due process requirement. *Smith* v. *Josten's American Yearbook Co.*, 78 F.R.D. 154, 162 (D. Kan. 1978). Adequacy of representation requires not only a lack of conflicts of interest between representatives and class members, it requires competent legal representation. *Krehl* v. *Baskin-Robbins Ice Cream Co.*, 78 F.R.D. 108, 116 (C.D. Cal. 1978). Meaningful representation of counsel as required by due process envisions counsel who will vigorously defend the interests of all class members, counsel who make formal decisions on vital issues, counsel who can accurately advise class members as to the course of the litigation. Class counsel in this case are experienced, able, and dedicated lawyers who have never turned from their fiduciary obligations to the class. But the best efforts to represent the class have been rendered futile now that this offer has been communicated to the class. The total and improper exclusion from the negotiation process hampers counsel from rendering accurate advice regarding the settlement. Refusal to allow class counsel to communicate their

evaluation of the *disapproved* settlement to the class transforms competent representation of counsel into meaningless representation of counsel, and those who accomplished this result will reap the benefits.

At the heart of the due process "fundamental requisite" of notice, hearing and representation is the notion that parties must be able to make informed decisions regarding the legal problems that they face. Where the parties are legally unsophisticated and absent from the action, informed decisions depend totally on the adequacy of the notice, hearing and representation afforded. When *any* of these three links to the party is removed, due process is violated. But the violation is perhaps greatest where the concerned link, the human link of representation, is destroyed. When faced with an often bewildering legal system and a giant corporate defendant, class members look to counsel for support, assurance, and protection. When the best advice class counsel can *possibly* give is hampered by the secret negotiations and class counsel are foreclosed from even giving the knowledge they have notwithstanding the abbreviated discovery and hearing, class members are deprived of any semblance of due process of law.

II.

REFUSING TO ALLOW PETITIONERS' COUNSEL TO COMMUNICATE WITH CLASS MEMBERS EXPLAINING AND EVALUATING THE OFFER OF SETTLEMENT IS A PRIOR RESTRAINT ON COUNSELS' SPEECH, IN VIOLATION OF THE FIRST AMENDMENT.

A prior restraint on speech is a "predetermined judicial prohibition restraining specified expression". *Chicago Council of Lawyers* v. *Bauer*, 522 F.2d 242 (7th Cir. 1975), cert. denied, 427 U.S. 912. Any prior restraint

bears a heavy presumption against its constitutional validity. *New York Times Company* v. *United States,* 403 U.S. 713, 91 S.Ct. 2140, 29 L. Ed.2d 822 (1971).

The district court has refused to allow petitioners' counsel to send a letter to class members expressing their objections to the settlement offer and their evaluation of the strength of plaintiffs' case balanced against the amount offered in settlement. In the Court of Appeal's opinion it was stated: "Whether the offer to settle should contain a statement by the plaintiff-objectors of their opinion of the adequacy of the settlement package in order to make the communication a full and complete disclosure is a matter left to the trial court's discretion." 594 F.2d, at 1140. Under the present circumstances, however, with the district court's refusal to conduct a hearing and consider the transmission aspect of the case, and its attendant monetary recovery, the Court's comment takes on an entirely different gloss. We submit that the district court's action inhibiting counsel's ability to communicate with their clients and with the public is highly disfavored, and action similar to that taken by the district court has been held to be an unconstitutional prior restraint. *Rodgers* v. *United States Steel Corp.,* 536 F.2d 1001 (3d Cir. 1976) (trial court prohibited class counsel from disclosing document outlining negotiations leading to individual settlement offer). See also, *Rodgers* v. *United States Steel Corp.,* 508 F.2d 152 (3d Cir. 1975); *Chicago Council of Lawyers, supra.* Class counsel have the right and duty to express their opinion of the settlement offer in the manner of their choice. Class members have the First Amendment right to receive that opinion.

> Sometimes a class of poor or powerless citizens challenges, by way of a civil suit, actions taken by our established private or semi-private institutions or governmental entities . . . The lawyer representing the

> class plaintiffs may be the only articulate voice for that side of the case. Therefore, we should be extremely skeptical about any rule that silences that voice. *Chicago Council of Lawyers,* 522 F.2d, at 258.

Class members, as full parties to this litigation, are entitled by the Due Process Clause of the Fifth Amendment to full, vigorous representation of counsel. Class members are entitled to know class counsels' opinion of the settlement offer. The only way to ensure that all class members will receive this opinion is to allow class counsel to contact, by mail, every member of the class. The notice approved by the district court requires class members to take the initiative and contact class counsel in order to obtain the information to which they are entitled as of right. Given the intimidating nature of the legal system, this plan will result in due process only for those sophisticated and aggressive enough to seek out the information. Those most in need of the advice of counsel will most likely never receive that advice. This "second best" solution does not satisfy the requirements of due process, and must not be allowed to stand.

The denial of class members, due process right to adequate representation is closely linked to their First Amendment right to be fully informed about their own law suit. In the area of "commercial speech", this Court has recently emphasized that communications by lawyers and other professionals to their prospective clients cannot be barred because of the client's First Amendment right to be fully informed. *See, e.g., Bates* v. *State Bar of Arizona,* 433 U.S. 350 (1977); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748 (1976). Here, the facts are even more compelling. Actual clients need to communicate with *their* lawyers. The trial court's ban on class counsel's proposed

letter makes this communication impossible, and clearly violates class members' constitutional rights.

III.

PERMITTING THE COMMUNICATION OF THE DISAPPROVED SETTLEMENT OFFER TO THE MEMBERS OF THE CERTIFIED CLASS CIRCUMVENTS THE PROTECTIONS PROVIDED BY RULE 23(e), SEVERELY PREJUDICING THE MEMBERS OF THE CLASS.

The impropriety of the settlement negotiations, documented in Point I above, cannot be questioned. Yet, the Court of Appeals' decision permits GM to profit from these irregular negotiations and the errors of the district court by communicating the offer to individual class members. Such a result bypasses the protections of Rule 23(e), and presents a serious threat to the class action device.

This case presents a question that has not been ruled upon in any court. No decision authorizing the communication of a disapproved settlement offer to individual class members has been found. Only three cases under Rule 23 have permitted post-certification communication of individual settlement offers. *Rodgers* v. *United States Steel Corp.*, 70 F.R.D. 639 (W.D. Pa. 1976), appeal dismissed, 541 F.2d 1365 (3d Cir. 1970); *Dickerson* v. *U.S. Steel Corp.*, 11 E.P.D. ¶10,848 (E.D. Pa. 1976); *Chrapliwy* v. *Uniroyal, Inc.*, 71 F.R.D. 461 (N.D. Ind. 1976). None of these cases involved a disapproved settlement. In fact, *Rodgers* and *Dickerson* involved the same settlement offer, embodied in a consent decree which was specifically found to be fair and adequate, see 70 F.R.D. 639, 644. In the case at bar, the settlement negotiations have not been found fair and adequate; they have been found unfair and prejudicial to the class.

Communication of a disapproved settlement offer to class members on an individual basis violates the spirit and purpose, if not the letter, of Rule 23(e). Rule 23(e) is designed to protect absent class members from unfair settlements through judicial scrutiny of the settlement offer and investigation into the settlement process. The effect of the rule is thus to protect the class by protecting the integrity of the settlement process. After finding that the integrity of the settlement process has been violated, the Courts should not compound the wrong by allowing the settlement to be communicated to the class.

The absent class members in this case have elected to be represented by class counsel, and have invoked the protection of the Court. They will be bound by the litigation. The class members are full parties to the litigation, not mere "putative" plaintiffs. As this case does not involve pre-certification communication, decisions in support of direct contact with putative class members are not on point. Indeed, the principal authority in support of such communication, *Weight Watchers of Philadelphia* v. *Weight Watchers International,* 455 F.2d 770 (2d Cir. 1972), expressly reserved the issue of communication with actual class members. 455 F.2d at 772, n.1. Communication with actual class members is a very different problem, particularly when a disapproved settlement offer is involved.

As full parties to the action, class members are entitled to vigorous representation of counsel at every stage of the proceeding. Allowing a defendant to make a direct offer of a settlement that was improperly negotiated completely bypasses this vigorous representation. As the Court of Appeals correctly pointed out, negotiations by less than all class counsel weakens the tactical position of the entire class by allowing the defendant to fragment the

class and then attack it at its weakest point. See 594 F.2d at 1125 n. 26. Petitioners have successfully demonstrated their complete and improper exclusion from the settlement negotiations, and the prejudice inherent in such exclusion. The order approving the settlement was reversed, in large part, for this very reason. But rather than allowing petitioners' counsel time for discovery into the negotiations, the Court has allowed GM another opportunity to profit from the improper negotiations. If the ruling is allowed to stand, GM will have made a successful "end run" around Rule 23(e), and petitioners' counsel will have been totally and irremediably excluded from the settlement process. GM should not be permitted to accomplish on an individual basis that which the Court has specifically refused to allow it to accomplish with respect to the entire class.

Permitting the communication of this settlement offer will be an invitation to engage in the very tactics condemned by the Court of Appeals in reversing the approval order. The fact that GM selected the State Attorney Generals to "negotiate the bargain" suggests that if they were not office holders, this communication of an unfairly achieved "settlement" would not cause any court to grant the face-saving measure implicit in its decision.

The Court in *In Re International House of Pancakes Franchise Litigations,* 1972 Trade Cas. ¶73,864 (W.D. Mo. 1972) ruled that "it is impractical, illogical and contrary to the interest of justice to allow the defendant to negotiate piecemeal settlements with individual members of this class under the guise of repurchasing their franchises," (a practice which the defendant contended was normal in its business but which the Court pointed out amounted to settlements since the repurchase agreements included a release of each franchisee's cause of action in

the class action suit). Similarly, "Developments in the Law — Class Actions," 89 Harv. L. Rev. 1318, 1548 n. 66 (1976), states:

> [I]ndividual claim satisfaction following certification and notice . . . generally should not be permitted. Once the court has determined that class action is appropriate and, in b(3) actions, given class members the opportunity to opt out, the defendant should not be allowed to fragment the class through individual settlement offers.

This principle applies with even greater force where the individual settlement offers are based on a settlement which has been disapproved by the Court. Class members ultimately look to the Court to protect their interests, as is evident from the letter from a class member quoted in the opinion of the Court of Appeals, 594 F.2d 1106, 1136:

> Regardless [sic] of the decision of the Court, I will accept it, because I cant [sic] whip a giant like General Motors, but you do have the powers of your Judgeship and your court to set things stright [sic] as they should be.

The Court does not adequately protect the class members when it allows communication of an offer to settle which it has disapproved. To uphold the purposes of Rule 23, the mandate of judicial integrity and due process, the Court should not expose individual class members to this offer which has failed judicial review and denies the class members adequate representation of counsel. After holding that neither the trial court nor petitioners' counsel had an adequate basis for evaluating the fairness of the offer, it is illogical and contradictory to force this evaluation on class members who are even less well informed. GM argued in the lower courts that it is "paternalistic" to withhold the individual settlement offer from the class

members, citing *Rodgers,* 70 F.R.D. at 644. This argument overlooks the fundamental distinction involved; this case involves a disapproved settlement. It is not paternalistic for the Court and counsel to seek to protect class members from making less than a fully informed decision on this important matter. Indeed, this protection is required by due process, as discussed in Point I above. Class members should not be pushed into an uninformed choice, with the resulting possible prejudice to themselves and the entire class, on the basis of "freedom of choice." Freedom of choice does not exist where the foundations of an intelligent, informed choice are absent.

In addition to the prejudice to the class in this case, the overall impact of the Court of Appeals' decision on the class action device must be examined. Allowing a defendant, particularly one as large and powerful as GM, to engage in improper negotiations, and then to use the resulting "offer" to fragment the class through individual settlements poses a serious threat to the maintenance of class actions. This is particularly true where the class action involves an aggregation of many small claims, where class members are less likely to be legally sophisticated, and are more susceptible to pressures to settle. It is precisely this type of case where the class action is most useful. As Mr. Justice Douglas has observed:

> The class action is one of the few legal remedies the small claimant has against those who command the status quo. I would strengthen his hand with the view of creating a system of law that dispenses justice to the lowly as well as to those liberally endowed with power and wealth.

Eisen v. *Carlisle & Jacquelin,* 417 U.S. 156, 186 (1974) (Justice Douglas, concurring, dissenting in part). The class action is an important social tool whereby justice is dispensed and important substantive policies are realized, such as the substantive policies of the Magnusson-Moss Act which this action seeks to enforce. Individual settlements pose a threat to the realization of these substantive policies by allowing large and powerful defendants to "buy out" and fragment the class.

> Potential representative parties could be so discouraged by the prospect that their litigation will be undermined by a defendant's expeditious satisfaction of claims that some meritorious representative actions might never be brought.

Dole, "The Settlement of Class Actions for Damages," 71 Colum. L. Rev. 971, 997 (1971). The demoralizing effect of this fragmentation is greatly mutiplied when class counsel have successfully attacked a settlement, only to have that very settlement used as the weapon that fragments the class.

Petitioners insist that the $200.00 per car consideration is negligible in terms of what can be recovered by each car purchaser, namely between $6,000.00 and $7,000.00 *plus* attorney fees.* In this regard, petitioners have not

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* This case is an excellent example of how a large and powerful defendant, General Motors, can attempt to "buy out" class members claims at a very cheap price. Contrasted to the $200 "offer" General Motors wants to make to the class, the available remedies provided by the Magnuson-Moss Act Title 15 §2301, et seq., exclusive of punitive damages range between recission of the contract and refund of the cars purchase price to itemized compilation of Loss of the Bargain which exceeds $2,000 *per car*:

dredged that figure from some pie-in-the-sky computation of their imagination. *That is a figure which was actually recovered by a class member in his individual suit in Louisiana which has been affirmed on appeal.* See *Gour* v. *Daray Motor Co., Inc. and General Motors Corp.,* No. 6893 (La. Ct. of App., decided June, 1979). (A copy of this opinion is included in the Supplemental Appendix to this Petition.) And this case concerned *only* engine switch allegations.

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* (Continued)

1. *REFUND*

The Louisiana Court of Appeals, Third Circuit # 6893 has affirmed a judgment and ordered GM to refund the original purchase price of $8,122.65 less $.08 a mile ($1,360.00) or $6,986.65 plus an award of $2,000. attorneys fees. *James F. Gour* v. *Daray Motor Co. Inc. and General Motors Corp.,* # 6893 Court of Appeal, Third Circuit State of Louisiana.

2. *REPLACEMENT/REPAIR*

The consumer can recover the costs necessitated in replacing Chevrolet parts with genuine Oldsmobile parts (simulating what the consumer would have to do if he or she wanted a real Oldsmobile), at a total cost of $3,777.72.

3. *DAMAGES "Loss of the Bargain"*

The consumer is entitled to damages comprised of the following:

(a) the difference in the purchase price of a comparably equipped Oldsmobile vs. a Chevrolet, estimated at	$ 500.00
(b) the difference in relative component value of the engine, and its components, exclusive of the 350/200 transmission estimated at	$ 419.15
(c) the difference in value lost by the consumers as a result of GM's substitution of the 200 transmission for the advertised 350, estimated at	$ 420.50

If GM is allowed to benefit by communication of this disapproved offer to the individual class members, this class action and the protections afforded by Rule 23(e) will be harmed beyond repair. GM will have side-stepped the disapproval of the settlement, and class members will have been denied the vigorous representation of counsel to which they are entitled. This unjust result will have been achieved with the approval of the very Court that should protect the interest of the class members in this litigation.

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* (Continued)

(d) the difference in gas consumption over the life of the car — the Oldsmobile gets 2 miles to the gallon more on the highway and 1 mile per gallon more in the city @65¢ a gal. (add 50% if you are paying 95¢ a gal. for unleaded gas), estimated at	$ 400.00
(e) the Chevy requires a tune-up every 22,500 miles, while the Olds only requires a tune-up every 30,000 miles. Moreover, there is a higher frequency of repairs incurred in the maintenance of a Chevrolet engine. (GM warranty analysis indicated 183% increased cost and 183% increased frequency of repairs). Maintenance of the smaller 200 transmission incurs additional costs, estimated at	$ 275.00
	$2,014.65

The absent class members have not been informed of these remedies in a meaningful way.

CONCLUSION

For the reasons set out above, petitioners respectfully submit that this petition for writ of certiorari should be granted.

Respectfully submitted,

CHARLES A. BOYLE
SCHEELE, SERKLAND AND BOYLE
77 West Washington Street
Chicago, IL 60602
(312) 368-1060
Plaintiffs' Liaison Counsel and Counsel for Plaintiffs-Objectors

Of Counsel:
LAWRENCE A. WALNER
WILLIAM J. HARTE
FRANCIS E. GOODMAN
ABRAHAM N. GOLDMAN

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CHARLES A. BOYLE
77 West Washington Street
Chicago, Illinois 60602
(312) 368-1060

Plaintiffs' Liaison Counsel and Counsel for Plaintiffs-Objectors

Of Counsel:

LAWRENCE A. WALNER
FRANCIS E. GOODMAN
ABRAHAM N. GOLDMAN
MICHAEL D. BUCHWACH
WILLIAM J. HARTE

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In the

United States Court of Appeals

For the Seventh Circuit

May 4, 1979

Before

Hon. THOMAS E. FAIRCHILD, *Chief Judge*

Hon. WILLIAM J. BAUER, *Circuit Judge*

Hon. HARLINGTON WOOD, JR., *Circuit Judge*

No. 78-2036

IN RE GENERAL MOTORS CORPORATION ENGINE INTERCHANGE LITIGATION

Appeal of: Betty Oswald, on her own behalf and on behalf of all other persons similarly situated, and Phil Miller and Eileen Miller, on their behalf and on behalf of all other persons similarly situated,

Plaintiffs-Appellants,

v.

GENERAL MOTORS CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. MDL 308—**Frank J. McGarr**, *Judge.*

ORDER

On consideration of the petitions for rehearing and suggestions for rehearing *in banc* of Part VI of the opinion in the above entitled cause by the plaintiff-objectors, no judge in active service has requested a vote thereon,* and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the petitions for rehearing and suggestions for rehearing *in banc* be, and the same are hereby, DENIED.

Treating pages 13 through 15 of the petition for rehearing filed by counsel for plaintiff-objectors Oswald, Miller and Balog as a motion for reassignment on remand pursuant to Circuit Rule 18, the judges on the original panel have voted that the motion be, and the same is hereby, DENIED.

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* Circuit Judges Walter J. Cummings, Wilbur F. Pell, Jr., and Philip W. Tone disqualified themselves from any consideration of the petitions for rehearing *in banc* filed in the above cause.

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ARGUED SEPTEMBER 28, 1978—DECIDED FEBRUARY 26, 1979

Before FAIRCHILD, *Chief Judge,* BAUER and WOOD, *Circuit Judges.*

WOOD, *Circuit Judge.* In 1976 the defendant, General Motors (GM), began substituting engines produced by its Chevrolet Division in many of the 1977 model year cars produced by its Oldsmobile Division. The discovery of the engine switch culminated in the commencement of a plethora of lawsuits against GM in the state and federal courts. The Judicial Panel on Multidistrict Litigation

transferred those actions which had been filed in the federal courts to the United States District Court for the Northern District of Illinois for consolidated pretrial proceedings with several actions which were already pending there. *See* 28 U.S.C. § 1407. The district court certified that the actions could be maintained as a class action and later approved the settlement of the actions as to one of two subclasses of Oldsmobile purchasers.

This appeal is from the order of the district court approving the subclass settlement. Although the facts are lengthy, the litigation's history complex, and the resolution of the issues difficult, the issues may be stated with relative simplicity:

First, is the district court's order approving the subclass settlement appealable?

Second, should counsel prosecuting the appeal be limited to representing the interests of those class members who objected to the settlement before the district court?

Third, did the district court err by refusing to permit appellants' counsel to inquire into the conduct of the negotiations that led to the settlement?

Fourth, did the district court err by dismissing with prejudice the federal claims of those class members who declined to release their state law claims pursuant to the settlement agreement?

We find that this court does have jurisdiction to entertain the appeal and hold that the trial court erred in approving the subclass settlement. Consequently, we reverse and remand the order of the district court with instructions.

I. Facts

A. The Engine Interchange Litigation

Beginning in 1974, GM planners began considering the manufacturing requirements for GM cars for the 1977 model year. By 1976 various GM management committees began planning for extensive interdivisional engine exchanges. Because the Chevrolet Division had a

significant surplus production capacity, GM planners decided to rely on Chevrolet produced engines to meet part of the engine requirements of GM's Buick, Oldsmobile and Pontiac Divisions.

To institute the engine interchange in the Oldsmobile Division, GM used codes to identify the different engines that would be used in its 1977 Oldsmobiles. The Rocket 350 V-8 engine produced by Oldsmobile, for example, was given the code name "L34"; the Chevrolet engine used in place of the Rocket was given the code "LM1."[1] Moreover, GM, over some objections by the Chevrolet Division, decided to adopt a common engine color for all of its engines. Thus, the distinctive red Chevrolet engine became blue. Despite the planned Oldsmobile-Chevrolet engine change, GM's advertising, EPA gas mileage disclosures, and communications to Oldsmobile dealers referred to the changes by the use of the codes.

The switch from standard components to different components in Oldsmobiles was not confined to engines. GM used different components than it had used in previous years for other parts of the power train (the engine, transmission, and drive axle) in some of its Oldsmobiles. For reasons which do not appear with clarity in the record, GM decided in 1976 to install in all 1977 Oldsmobile Delta 88 coupes and sedans the THM 200 transmission instead of the THM 350, the transmission traditionally used in those cars. The THM 200, like the THM 350, is produced by GM's Turbohydramatic Division. The THM 200, originally designed for use in the subcompact Chevette, was used in all 1977 Delta 88 coupes and sedans regardless of whether they contained Oldsmobile or Chevrolet engines. The appellants maintain that GM's advertising materials nevertheless indicated that the THM 350 was standard equipment in all 1977 Deltas.

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[1] Three Chevrolet produced V-8 engines were used in 1977 Oldsmobiles: the LM1, a 350 engine equipped with a four-barrel carburetor, the L65, a 350 engine equipped with a two-barrel carburetor, and the LG3, a 305 cubic inch displacement engine. The class eventually certified by the district court includes all purchasers of Oldsmobiles with Chevrolet engines regardless of which of the three Chevrolet engines the purchasers actually received.

The case before this court is a subset of the Oldsmobile litigation spawned by the discovery of the engine interchange. After filing suit in the Cook County Circuit Court alleging violations of the Illinois Consumer Fraud and Deceptive Business Practices Act, Ill. Rev. Stat. ch. 121½, §§ 261-272, the Illinois Attorney General filed suit in the federal court for the Northern District of Illinois on behalf of the State of Illinois, which had purchased a 1977 Oldsmobile with a Chevrolet engine, and more than 100 other Oldsmobile purchasers.[2] The complaint alleged that the sale of the Oldsmobiles without disclosure of their engine source violated the Magnuson-Moss Act, 15 U.S.C. §§ 2301-2312, and sought certification of the action as a

[2] The Magnuson-Moss Act limits federal court jurisdiction over class actions prosecuted under the Act to those actions in which the amount of each individual claim is at least $25, the total amount in controversy is at least $50,000, and the number of named plaintiffs is at least 100. 15 U.S.C. § 2310(d)(3). Otherwise, presumably every consumer complaint alleging a violation of the Act could have been maintained in the federal courts, without regard to the amount in controversy, under 28 U.S.C. § 1337. *Compare Barnette v. Chrysler Corp.*, 434 F. Supp. 1167 (D. Neb. 1977) (individual action alleging a violation of the Act and seeking recovery of the purchase price of a defective car could not be maintained in federal court, because it failed to meet the $50,000 requirement). On the other hand, the Act's amount in controversy requirements, by lowering from the usual $10,000 to $25 the amount necessary for individual claims but requiring an aggregate amount of at least $50,000, reduce the obstacles normally encountered in meeting the jurisdictional amount necessary to maintain a class action. *See Snyder v. Harris*, 394 U.S. 332 (1969); *Zahn v. International Paper Co.*, 414 U.S. 291 (1973). The number of named plaintiffs required, however, remains a substantial barrier to maintaining class actions under the Act. It was enacted by Congress to prevent "trivial or insignificant" class actions from being brought in the federal courts. H.R. Rep. No. 93-1107, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 7702, 7724. Although the Illinois Attorney General's complaint was the only complaint to satisfy the last jurisdictional requirement, we attach no particular significance to this fact.

nationwide class action.[3] The *Oswald* and *Miller* actions were later brought to the federal district court and consolidated with the *State of Illinois* action before Judge McGarr. Upon GM's petition, the Judicial Panel on Multidistrict Litigation transferred seven actions then pending in other federal courts to the Northern District for consolidated pretrial proceedings.[4]

[3] General Motors characterizes the case before this court as "only the tip of a litigation iceberg" over GM's interdivisional engine use. The widespread publicity given to the engine switch by the initial lawsuits bred additional lawsuits. Other Attorneys General soon filed state court actions against GM under state consumer protection statutes. Furthermore, many individual car buyers started state court proceedings seeking individual and sometimes class relief. Altogether, GM estimates, over 300 engine interchange actions were filed against GM since March 1977. Forty-one of the suits were filed as class actions and thirty-three were brought by state Attorneys General. Some of the actions were initiated by purchasers of 1977 Buicks and Pontiacs which, like the Oldsmobiles in this suit, were equipped with Chevrolet engines. At least two suits were filed by owners of 1977 Buicks and Cadillacs, alleging that they received cars equipped with Oldsmobile engines. *See In re GMC Engine Interchange Litigation*, 441 F. Supp. 933 (J.P.M.D.L. 1977) (transferring actions to the Northern District of Illinois for consolidated pretrial proceedings). GM's interdivisional engine program also prompted investigation by the Federal Trade Commission. *See GMC v. FTC*, 1978-1 Trade Cas. ¶62,005 (N.D. Ohio 1977) (rejecting GM's challenge to the authority of the Commission to undertake the investigation). The bulk of the lawsuits, however, appear to involve 1977 Oldsmobiles, the subject of the litigation before this court.

[4] The Oldsmobile actions that eventually were consolidated for pretrial proceedings are: *State of Illinois v. GMC*, No. 77-C-927 (N.D. Ill.); *Oswald v. GMC*, No. 77-C-1006 (N.D. Ill.); *Miller v. GMC*, No. 77-C-1436 (N.D. Ill.); *Skokie Central Traditional Congregation v. GMC*, No. 78-C-1457 (N.D. Ill.); *State of Alabama ex rel. Baxley v. GMC*, No. 77-P-0881-S (N.D. Ala.); *Creel v. GMC*, No. CA-77-P-0440-S (N.D. Ala.); *Natter v. GMC*, No. CA-77-P-0659-S (N.D. Ala.); *Balog v. GMC*, No. 77-443 (W.D. Pa.); *Hannan v. GMC*, No. 77-C-265 (E.D. Wis.); *King v. GMC*, No. M-77-24-CA (E.D. Tex.); *Levine v. GMC*, No. 77-C-849 (E.D.N.Y.); *Parker v. GMC*, No. S-77-0174(N) (S.D. Miss.).

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On July 22, 1977, the district court entered an order adopting an agreement of the numerous counsel for the plaintiffs in the consolidated cases. The order created an executive committee of six attorneys to represent the plaintiffs in all pretrial proceedings. *See generally* Manual for Complex Litigation §§ 1.92-1.93.[5] Although the committee was given broad power in the pretrial proceedings, the order provided that the committee could conduct settlement negotiations only with the consent of all counsel for the named plaintiffs.

On October 13, 1977, the district court certified the consolidated cases as a class action. The order defined the class as "[a]ll persons . . . who purchased 1977 Oldsmobile automobiles which without their knowledge or consent, contained V-8 engines manufactured by the Chevrolet Motor Division . . ." The court dismissed all federal claims except the Magnuson-Moss claim and declined to exercise its power to take pendent jurisdiction over the related state law claims. The trial court recognized that parallel state court actions were pending, but rejected GM's position that the state pro-

[4] *continued*

The various federal actions were consolidated before the district court for pretrial purposes only. Although the actions have not been consolidated for trial purposes, the appellants do not contest, and we do not question, the district court's authority to approve a settlement of all the actions before it. *See* 15 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3866 at 374-76 (1976); Weigel, *The Judicial Panel on Multidistrict Litigation, Transferor Courts and Transferee Courts*, 78 F.R.D. 575, 582-83 (1978).

The order certifying the class action found that each of the named plaintiffs would adequately represent the class and confirmed the representative status of each. Therefore we need not decide whether all of the actions are technically before us, because we find that the appeal of some of the named plaintiffs is sufficient to permit this court to consider the interests of all class members. *See also* Part III of this opinion *infra*.

[5] All citations in this opinion unless otherwise noted are to the Manual's fourth edition. Citations to particular pages follow the pagination of the Wright and Miller edition.

ceedings should prevent class certification on the Magnuson-Moss claim. Despite the certification of the class, no notice to class members was mailed to inform them of the pendency of the class action at that time.

B. The Settlement

Sometime during the fall of 1977, General Motors entered into settlement negotiations with representatives of the various state Attorneys General who had filed or were contemplating filing actions against GM.[6] A representative of the Illinois Attorney General who was also a member of the executive committee participated in the negotiations without leave of the district court or other counsel for the plaintiffs in the federal class action. On December 13, 1977, one of the counsel for the plaintiffs received word that a tentative settlement agreement had been reached by GM and the Attorneys General. The attorney, in essence, requested the district court to order immediate disclosure of the progress of the settlement negotiations or any agreements that had been reached. The trial court, however, regarded the motion as premature. Unwilling to interfere with communications between GM and the Attorneys General before an agreement was reached, the district court declined to order the requested relief. The trial judge remarked that he believed he had sufficient power over the approval of any settlement to protect the interests of class members.

Six days later on December 19, the Illinois Attorney General in his capacity as one of the class counsel moved that the district court consider the settlement agreement between GM and all but five of the fifty state Attorneys General.[7] The proposed settlement provided that GM would provide to each consumer who had purchased a 1977 Oldsmobile, Buick or Pontiac equipped with a

[6] GM maintains that the negotiations were begun at the suggestion of the Consumer Protection Committee of the National Association of State Attorneys General.

[7] Several other state Attorneys General have since joined in the agreement.

Chevrolet engine on or before April 10, 1977, $200 plus a 36-month or 6,000-mile extended warranty on the power train. In return each purchaser would be required to sign a release of all state and federal claims concerning the substitution of engines, components, parts, and assemblies in the car. GM also agreed to disclose the source of all engines of new GM cars for the next three years. The Attorneys General, in turn, promised to secure dismissals with prejudice of all actions prosecuted by them.

The district court showed itself willing to consider the agreement as a basis for settling the class action. Although the court afforded private counsel time to conduct discovery to determine whether the settlement was fair, it denied the motion of some of plaintiffs' counsel for discovery into the negotiations between the Attorneys General and GM. The court maintained that the negotiation process was irrelevant to the central issue of the fairness of the settlement.

Furthermore, the district court entertained GM's motion to redefine the class to include only those Oldsmobile purchasers to whom the settlement agreement contemplated payment. The class originally included all 1977 Oldsmobile purchasers who bought their cars before October 13, 1977, without knowledge that the cars had Chevrolet engines. The settlement agreement contemplated narrowing the class to purchasers before April 11, 1977. In an order dated March 14, 1978, the trial court denied GM's motion to redefine and narrow the class. The court did, however, designate "for purposes of sending the settlement notice" a subclass of pre-April 11 purchasers.[8] Notices informing class members of the pendency of the class action were sent out shortly thereafter. The notice to settlement subclass members, in addition to informing them of the pendency

[8] The trial court also agreed with GM to broaden the class in one respect. The court, for the purpose of settlement only, struck the no-knowledge-or-consent requirement of the original class certification as to members of the settlement subclass. This conformed the subclass to the precise class of Oldsmobile purchasers contemplated by the GM-Attorneys General agreement.

of the action, informed them of the proposed settlement and gave them the opportunity, *inter alia*, to opt-out of the action or to object to the proposed settlement. The notice to class members not in the settlement subclass merely provided notice of the action and the opportunity to opt-out.

In May 1978, pursuant to its authority under Fed. R. Civ. P. 23(e), the district court held a fairness hearing to determine whether it should approve the settlement. Because some of the private counsel objected to the settlement, the hearing was contested and lasted twelve days. The order of proof was irregular. Both sides submitted numerous exhibits. The plaintiff-objectors presented, among others, several 1977 Oldsmobile owners who objected to the settlement and two mechanics who testified that the substituted power train was inferior to the one GM allegedly warranted. GM relied largely on exhibits and the testimony of a Chevrolet staff engineer who testified that the power trains warranted and those provided were comparable.

On July 17, 1978, after considering post-hearing memoranda of the various sides in the litigation, the district court entered an order approving the subclass settlement as fair. Adopting GM's proposed findings of fact almost verbatim, the district court found that the engines and other parts included in the Oldsmobiles were "comparable" to those warranted. Resolving most of the other contested issues in favor of GM, the district court ordered the action dismissed as to all members of the subclass and directed GM to send an approved notice of settlement to each member of the subclass. Before the notice could be mailed, however, some of the plaintiff-objectors prosecuted this appeal.[9]

[9] After the notice of appeal was filed, the Illinois Attorney General made a motion before the trial court requesting permission to send the settlement notice (with additional language indicating the pendency of the appeal) to subclass members. The trial court held that the appeal deprived it of jurisdiction to entertain the motion, but indicated that if it had had jurisdiction, it would have granted the motion. The Attorney General then, with the apparent acquiescence of the

(Footnote continued on following page)

II. Appealability

The plaintiff-objectors prosecuting this appeal and GM agree that this court has jurisdiction to hear this appeal. The attorney for one of the plaintiffs and an objector to the settlement before the trial court, however, maintains that the trial court's order approving the settlement is neither a final decision nor a collateral order within the meaning of 28 U.S.C. § 1291.[10] Of course, we cannot determine this court's jurisdiction by majority vote of counsel appearing before us and, even if the parties unanimously agreed to appeal the order, we would be required to raise the issue *sua sponte*. *Levin v. Baum*, 513 F.2d 92 (7th Cir. 1975).

There is only one apparent obstacle to our hearing this appeal. The trial court's division of the class into two subclasses arguably makes this a multi-party action

[9] *continued*
plaintiff-proponents and GM, moved this court for relief under Fed. R. App. P. 8(a). Because the contents of the notice were at issue on this appeal, we took the motion under advisement. Our decision on the merits of the appeal necessarily precludes sending out the notice in its present form. Accordingly, we hereby deny the motion.

[10] Disagreement between attorneys for the class, as will become apparent, has become the norm in the conduct of this litigation. For our purposes, counsel for the class may be divided into basically three groups. Those who objected to the proposed settlement in the trial court shall be referred to as plaintiff-objectors. Despite the division over the appealability issue, the attorney contesting the jurisdiction of this court to entertain the appeal is a member of this group. Those private counsel who supported the settlement shall be referred to as plaintiff-proponents. Finally, the Attorneys General from Illinois and Alabama who represented named plaintiffs in the trial court constitute the third group. The latter two groups have aligned themselves with GM on many of the issues in this appeal.

subject to the requirements of Fed. R. Civ. P. 54(b).[11] In an order following its approval of the subclass settlement, the trial court refused to make a determination that there was no just reason for delay and to direct entry of judgment. We hold that, despite the refusal of the trial court to enter judgment pursuant to Rule 54(b), we have jurisdiction to review the order approving the subclass settlement as a collateral order.[12]

The Supreme Court has taken an "intensely practical" approach when deciding whether judgments are appealable. *Mathews v. Eldridge*, 424 U.S. 319, 331 n.11 (1976). In close cases the determination must be made by balancing the "inconvenience and costs of piecemeal review" against "the danger of denying justice by delay." *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152-53 (1964). We are cognizant that the federal policy against piecemeal review admits no exception merely because the judgment appealed from affects the conduct

[11] There is considerable doubt whether Fed. R. Civ. P. 54(b) was intended to govern the situation when two distinct subclasses are created from a single class and one subclass' right to recover under a settlement neither affects nor is affected by the merits of the other subclass' claim. Aside from the difficulty of construing "multiple parties" to encompass separate subclasses, the settlement of one subclass' suit arguably should be treated as a separate lawsuit outside the ambit of Rule 54(b). This practical view of the position of the subclasses accords with the legal effect of creating subclasses under Fed. R. Civ. P. 23(c)(4). That rule provides that when a class is subdivided "each subclass [shall be] treated as a class, and the provisions of this rule shall then be construed and applied accordingly." Each subclass must independently meet the requirements of Rule 23 in order to be maintained as a class action, 7A C. Wright & A. Miller, Federal Practice and Procedure § 1790 at 191-92 (1972), and therefore it seems consistent with the spirit of the rules to treat each subclass action as a separate action for all purposes.

[12] Because we find that even if Rule 54(b) encompasses the present litigation that an independent basis for jurisdiction exists, we need not attempt to reconcile Rule 23 with Rule 54(b). Collateral orders are appealable without the express entry of judgment under Rule 54(b). *See Swanson v. American Consumer Industries, Inc.*, 517 F.2d 555, 560-61 (7th Cir. 1975).

of a class action. *See Coopers & Lybrand v. Livesay*, 98 S. Ct. 2454 (1978) (striking the death knell for the death knell doctrine); *Weit v. Continental Illinois National Bank & Trust*, 535 F.2d 1010 (7th Cir. 1976) (order requiring notice to class members is not a collateral order). We believe, however, that although the federal courts have narrowly interpreted the collateral order doctrine established in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), that this case falls within "that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Id.* at 546.

The first requirement of the collateral order doctrine is that the matter appealed from must have been finally determined by the district court.[13] This does not require that the trial court be without power to reverse its ruling; it only requires that no further consideration be likely. 15 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3911 at 470 (1976). The record amply indicates the trial judge's resolve not to reconsider the fairness of the subclass settlement. After the long fairness hearing, the trial court approved the settlement in an order with fairly extensive findings of fact. The order purported to immediately dismiss the claims of all subclass members. Afterward, the trial court on two occasions declined to reconsider its decision. Moreover, although the trial court retained jurisdiction over the settlement subclass action to supervise the implementation of the settlement, this left the trial court with only the ministerial task of executing its judgment. The trial court's order, therefore, is not tentative and it finally determines the matter appealed to this court.

[13] "There are two aspects of the final judgment rule. One is that the order be the final disposition of the entire case. The other is that the order be the final disposition of the issue. The *Cohn* rule permits a limited exception with respect to the first aspect but not with respect to the second." *Rodgers v. United States Steel Corp.*, 508 F.2d 152, 159 (3d Cir.), *cert. denied*, 423 U.S. 832 (1975).

The second requirement of the collateral order doctrine is that the matter appealed must be "separable from, and collateral to, rights asserted in the action" and neither affect nor be affected by decision on the merits. 337 U.S. at 546. Application of this requirement to appeals from decisions on the fairness of a settlement presents some difficulties. Ordinarily settlements of civil litigation are not reviewed by federal courts. Thus, the issue is raised almost exclusively in class or derivative actions.[14] One court of appeals, however, has held that a refusal of a trial court to approve a class action settlement to be "collateral," *Norman v. McKee*, 431 F.2d 769 (9th Cir. 1970), *cert. denied*, 401 U.S. 912 (1971), and another has reviewed such a refusal without expressly considering the appealability issue, *In re International House of Pancakes Franchise Litigation*, 487 F.2d 303 (8th Cir. 1973).[15]

[14] Court approval of settlements is also necessary in bankruptcy reorganization proceedings. *See, e.g., Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414 (1968).

[15] The Second Circuit has recently rejected the position taken by the Eighth and Ninth Circuits and refused to review a trial court's refusal to approve a settlement of a shareholders derivative action. *Seigal v. Merrick*, Nos. 77-7566, 77-7576 (2d Cir. Dec. 14, 1978). Because this appeal challenges the trial court's approval of a settlement, we need not align this court on one side of this conflict between the Circuits. This appeal because of the subclassing of Oldsmobile purchasers for the purposes of settlement presents a situation unlike those which ordinarily confront class members or shareholders after the trial court's approval or disapproval of a proposed settlement of a representative action. In *Seigal* the court stated that "[an approved] settlement . . . is not a deviation from the main path of the litigating process. It is a step on that path directly leading to final judgment. An approval of a compromise, after appropriate notice, becomes a final judgment." Slip op. at 657. In the case at bar, the trial court's approval of the subclass settlement does not lead directly to final judgment. But unlike a disapproval of a settlement, the trial court's order looks toward neither a renewal of settlement negotiations nor a trial on the merits. Thus, the danger of appellate court interference with proceedings before the trial court is small in comparison with the danger of denying justice by delay.

Although in *Norman* the court maintained that appellate review of the initial determination of the settlement's fairness was completely divorced from the merits of the claim, adequate review of the fairness of a settlement necessarily requires some examination of the underlying cause of action. 15 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3911 at 385 (1976); *see* Manual for Complex Litigation § 1.46 at 56. *See also Coopers & Lybrand v. Livesay*, 98 S. Ct. at 2458 ("the class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action' "). Nevertheless, several factors bring this appeal within the separateness requirement. First, the Supreme Court has not applied the requirement that the issue be "separate" from the merits to require the precise division of the issues presented on appeal and the elements of the underlying cause of action that a semanticist might expect. *See National Socialist Party v. Village of Skokie*, 432 U.S. 43 (1977). Moreover, to the extent that this appeal raises issues about the regularity of the conduct of the settlement negotiations or the fairness hearing, consideration of the merits of the plaintiffs' cause of action is unnecessary. Similarly, because appellate courts will reverse a trial court's determination on the fairness of a settlement only if there is a clear abuse of discretion, consideration of the merits is necessarily something less than penetrating.

Finally, the order approving the settlement is, in one sense, completely separate from the merits of the action. The trial court's approval of the settlement precludes any decision on the merits of the settlement subclass' claim because the claim will never go to trial.

The third requirement of the collateral order doctrine is that the rights asserted would be lost, probably irreparably, if review were delayed until the conclusion of proceedings in the district court. It is unlikely that the claims of the post-April 10, 1977, Oldsmobile purchasers will be decided any time soon. GM has made clear its intention not to settle with that subclass. Therefore years of litigation before the entire class action is concluded is possible. In the meantime, the

settlement, if executed, contemplates the release of state and federal claims by those class members who accept the settlement package and dismissal of the Magnuson-Moss claims for those who do not. If the settlement is later undone on appeal, ordering reimbursement by those who accepted the $200 and received benefits under the mechanical insurance policy would be practically impossible.[16] Those signing releases might also lose their state claims against GM because of the running of the statutes of limitation. Conversely, those who decline to sign the release, may file and pursue state claims. Any judgment in the state courts may possibly bar subsequent action on their Magnuson-Moss claims.

We conclude that "delay of perhaps a number of years in having [their] rights determined might work a great injustice" to the subclass members. *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 153 (1964). They "cannot make important decisions about . . . further participation in this suit without having [their] rights determined now." *Diaz v. Southern Drilling Corp.*, 427 F.2d

[16] These characteristics of the settlement approved by the trial court distinguish this appeal from the appeal which was dismissed for lack of an appealable order in *Rodgers v. United States Steel Corp.*, 541 F.2d 365 (3d Cir. 1976). In *Rodgers* the trial court permitted the defendant to communicate to individual members of the class an offer to enter into individual settlements. *See Rodgers v. United States Steel Corp.*, 70 F.R.D. 639 (W.D. Pa. 1976). *See also* Part VI of this opinion *infra*. The trial court merely approved the communication of the offer; it did not finally determine the rights of any member of the class. *See* 541 F.2d at 370. In the present case, the trial court dismissed the federal claims of all settlement subclass members and effectively terminated their participation in the class action whether they released their claims or not. Moreover, the settlement offer in *Rodgers* merely promised payment of back pay in return for signed releases. The Court of Appeals, dismissing the appeal, noted that the parties could be returned to their original positions if the release was subsequently invalidated. *Id.* at 371. Here, we cannot say with any degree of certainty that we could later return to GM the benefits that class members received under the mechanical insurance policy.

1118, 1123 (5th Cir.), *cert. denied*, 400 U.S. 878 (1970).[17] The possibility that later appellate review would be effective is simply too slight.

A final requirement of the collateral order doctrine is that the order must present "important and unresolved legal questions." *Weit v. Continental Illinois National Bank & Trust Co.*, 535 F.2d 1010, 1015 (7th Cir. 1976); *Weight Watchers, Inc. v. Weight Watchers International, Inc.*, 455 F.2d 770, 773 (2d Cir. 1972). We think this appeal raises at least two important questions concerning the proper balance between the general policy of encouraging settlements and a court's specific duty to insure the fairness of class action settlements. The first question involves the scope of discovery which should be afforded to objectors to proposed class settlements which were negotiated under questionable circumstances.

[17] *Cf. Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1221 (5th Cir. 1978), *cert. denied*, 47 U.S.L.W. 3475 (1979):

> The court's November 20 order required awardees wishing to opt into the settlement to do so by December 15, 1975 or be deemed to have opted out of the subclass. This created a dilemma for dissatisfied subclass members, who were faced with the equally unpalatable alternatives of opting into a possibly invalid settlement or being relegated to individual lawsuits. A decision to opt into the settlement by endorsing the back pay check and thereby releasing the company of all liability for past discrimination might preclude entitlement to a share in a new agreement or award if the settlement were invalidated on appeal. On the other hand, a decision to opt-out of the subclass by failing to cash the tendered check would create the possibility of receiving no back pay award if the appeal were unsuccessful and an individual lawsuit proved unrealistic. . . .
>
> The procedure adopted by the district court, by requiring claimants to choose whether or not to opt into the settlement *before* they could exercise their right to appellate review, unfairly burdened the rights of awardees to appeal the settlement and thereby significantly undermined one of the most important procedural protections associated with the approval of a settlement. We hold that the ability of subclass members to opt into a back pay settlement may not be terminated before a final determination of the propriety of that settlement is made.

Because adequate representation is the foundation of all representative actions, *see* Fed. R. Civ. P. 23(a)(4), *Hansberry v. Lee*, 311 U.S. 32 (1940), we think this question is appropriately reviewed at this time. The second question concerns the nature of the "settlement" that Rule 23(e) authorizes the trial court to approve. Because this question goes to the power of the district court in the settlement of representative actions, we believe it is sufficiently important to receive appellate consideration now.

In conclusion, the trial court's order is not tentative; it is capable of review without extensive examination of the merits; it raised issues which could not be effectively reviewed later; and it presents important, unresolved legal questions for consideration by this court. We hold that the trial court's order approving the subclass settlement is an appealable collateral order.

III. Motion to Limit the Appeal

Before oral argument, the attorney representing the State of Alabama in this litigation presented to this court a "motion to limit appeal to certain named appellants." The motion seeks to have the effect of this court's decision limited to (1) only the named plaintiffs, Oswald and Miller, the plaintiff-objectors prosecuting this appeal or, alternatively, (2) only those class members who filed objections to the proposed settlement in the district court. We consider the arguments in support of the second alternative first.

It is argued that this court's decision in *Research Corp. v. Asgrow Seed Co.*, 425 F.2d 1059 (7th Cir. 1970), compels this court to restrict the representative standing of the named plaintiffs who prosecute this appeal to those class members who objected to the settlement in the trial court. In *Research*, the appellants were members of a defendant class represented in the district court by numerous named defendants. Despite adequate notice, the appellants failed either to request exclusion from the defendant class or to object to a proposed settlement negotiated by the named defendants; the appellants attacked the fairness of the settlement for the

first time on appeal. This court held that the failure of the appellants to intervene in the action foreclosed their right to appeal. Here it is argued by analogy that each individual subclass member who failed to object to the settlement before the trial court has waived the right to appeal and the right to be represented by others on appeal. We think the argument is without merit.

There is no doubt that the named plaintiffs, Oswald and Miller, preserved the right to appeal. They are parties to the lawsuit; intervention was obviously unnecessary. Moreover, through their attorneys they vigorously objected to the settlement in the district court and created a record adequate for appellate review. Thus, the issue raised by the motion may be refined to whether Oswald and Miller through their counsel may represent the interests of absent subclass members on this appeal.

We would be reluctant to hold that absentee class members waive appellate review merely because they failed to take affirmative action when their interests were already being adequately represented by participants in the lawsuit. *Cf. Ace Heating & Plumbing Co. v. Crane Co.*, 453 F.2d 30, 32-33 (3d Cir. 1971) (objectors' failure to opt-out of a class action does not preclude appellate review). To do so would unnecessarily restrict the representational character of all class actions. We need not reach the issue here, however, because the notice of the proposed subclass settlement informed subclass members that if they neither opted out of the subclass nor intervened in the lawsuit that "attorneys for the named plaintiffs will represent your interest in these suits." We think subclass members who received the notice could reasonably rely on class counsel to protect their interests by prosecuting an appeal from the judgment of the district court if necessary. *See Gonzales v. Cassidy*, 474 F.2d 67 (5th Cir. 1973) (failure to appeal approval of an unfair settlement constitutes inadequate representation). We therefore decline to hold that absentee subclass members waived their right to have the settlement reviewed by this court.

The second argument advanced in favor of limiting the representative capacity of the plaintiff-objectors on this appeal is that the pretrial order of the trial court vested the power to conduct all pretrial actions on behalf of the class in the attorneys' executive committee. Because the executive committee did not authorize the prosecution of the appeal, it is argued, the authority of counsel for the plaintiff-objectors must be confined to representing the individual named plaintiffs before this court.

We question initially the premise that it is the attorney, not the named plaintiff, who possesses the power to appeal the approval of a settlement. "[T]he decision to appeal a class action judgment must rest with class plaintiffs," not class counsel. *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1177-78 (5th Cir. 1978), *cert. denied*, 47 U.S.L.W. 3475 (1979). Since the pretrial order did not purport to restrict the representative capacity of the named plaintiffs prosecuting this appeal, it would seem that the argument misses the mark. The court in *Pettway*, however, acknowleged that "no clear concept of the allocation of decision-making responsibility between the attorney and class members has yet emerged." *Id.* at 1176. Consequently, assuming *arguendo* the premise that the class attorney is the *dominus litus*, we consider and reject the argument that the pretrial order prohibits counsel for Oswald and Miller from representing the interests of the class before this court.

The pretrial order does not on its face vest the power to appeal in the executive committee. The order itself only lists the committee's various duties and powers relating to pretrial proceedings. We would be extremely reluctant to imply a provision that restricts the right to appeal decisions of the trial court. Furthermore, even if the pretrial order contemplated giving the executive committee the power to prohibit individual attorneys from appealing, whether the executive committee has done so is unclear. The minutes of the committee meeting show that the committee did pass a motion that no appeal be taken from the trial court's approval of the settlement. Nevertheless, those minutes also indicate that before passage of the motion "[t]he chair ruled that

the motion does not proclude [*sic*] anyone from appealing but states the position of the majority of plaintiffs' counsel."

We believe that the question of whether an appeal should be made and the scope of that appeal should be answered by determining the best interests of the class. The plaintiff-proponents maintain that the settlement is fair, that the approval of the trial court is correct, and that the matter is best left unreviewed by this court. Plaintiff-objectors, of course, disagree. The purpose of Fed. R. Civ. P. 23(e) is to protect the interests of absentee class members; the danger of abuse is high and the protection of their interests cannot be left to class counsel alone. Rule 23 imposes on the trial court in the first instance, and on this court eventually, the duty to examine the fairness of proposed settlements. Limiting the representative capacity of the appellants on this appeal would effectively negate this court's obligation to act as the guardian of the class. We do not believe that the interests of class members are best served by leaving the settlement unreviewed. *Cf. McDonald v. Chicago Milwaukee Corp.*, 565 F.2d 416, 471 n.1 (7th Cir. 1977) (permitting briefs and oral arguments by parties who failed to file a separate notice of appeal because the case involved "issues inextricably bound up with" those properly before the court). Restricting the appeal would only leave the door open to additional individual appeals by those who decline to accept the settlement offer. A series of individual and possibly conflicting appellate decisions on the propriety of the settlement would undermine the representative nature of class actions significantly and sacrifice the public's interest in judicial economy unnecessarily. We hold that plaintiff-objectors Oswald and Miller are parties who through their counsel will fairly and adequately protect the interests of the class in this appeal. *See* Fed. R. Civ. P. 23(a)(4) (requirement for class certification).

We do not hold "that each individual plaintiff and lawyer must be permitted to do what he pleases in litigation as complex as this, and can behave in total disregard of the interest of other litigants and of the class. . . ." *Farber v. Riker-Maxson Corp.*, 442 F.2d 457,

459 (2d Cir. 1971). We note the following factors which convince us that the interests of the class will be well represented on this appeal. *Cf. Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1178-80 (5th Cir. 1978), *cert. denied*, 47 U.S.L.W. 3475 (1979) (discussing factors relevant to determining whether the named plaintiff may appoint new counsel to appeal the approval of a settlement negotiated by former class counsel). First, the named plaintiffs and their counsel were among the first to file engine switch suits against GM. Second, counsel for the appellants was a member of the class executive committee and is well acquainted with the litigation. Despite suggestions and innuendoes of ulterior motives in some of the briefs which we can only regard as symptoms of "the 'brief writer's hyperbole' syndrome," *United States ex rel. Sims v. Sielaff*, 563 F.2d 821, 824 n.6 (7th Cir. 1977), nothing in the record indicates that appellants' counsel has acted with other than the best interests of the class in mind. Third, although vocal objection to the settlement among class members was not widespread, "the sentiment of the class is but one factor in our analysis of the appealability question." *Pettway*, 576 F.2d at 1178. In *Patterson v. Stovall*, 528 F.2d 108 (7th Cir. 1976), this court heard the appeal of objectors to a class action settlement even though the objectors constituted only .0018% of all class members and their claims constituted only .0022% of all claims. *Id.* at 109 n.1. *See also Mandujano v. Basic Vegetable Products, Inc.*, 541 F.2d 832 (9th Cir. 1976) (reversing settlement even though only 4% of the class was in active opposition to it). Fourth and finally, we find that the issues raised on appeal are far from meritless.[18]

We conclude that the best interests of the class warrant that this court review the fairness of the settlement as it affects the entire class. Consequently, we consider the merits of the objections to the trial court's approval of the proposed settlement.

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[18] In *Patterson v. Stovall*, 528 F.2d at 109 n.1, we noted: "Although in terms of the class and settlement [appellants'] number and size might be considered miniscule, the serious issues raised before this Court are not reduced in their magnitude."

IV. Conduct of the Settlement Negotiations

The plaintiff-objectors challenge the refusal of the trial court to permit them to conduct discovery into the settlement negotiations. They contend that the trial court's order prohibiting discovery and the court's limitation of examination of the Assistant Illinois Attorney General during the fairness hearing prevented them from being able to determine whether the proposed settlement was fair, reasonable and adequate. The trial court's order limiting discovery evidences its belief that how the settlement was reached was irrelevant to the issue of the fairness of the settlement.[19] The court's findings of fact, although finding the irregular method of negotiating the settlement did not prejudice subclass members, reaffirmed the court's belief that the objection was irrelevant to the adequacy of the settlement "and would not constitute sufficient grounds to withhold an otherwise fair settlement from consideration by the subclass members."

We think that the conduct of the negotiations was relevant to the fairness of the settlement and that the trial court's refusal to permit discovery or examination of the negotiations constituted an abuse of discretion.[20] In addition, we do not think that the record adequately supports the court's conclusion that the seemingly irregular conduct of the negotiations did not prejudice the interests of the class. We must, therefore, reverse the trial court's order approving the settlement.

[19] The plaintiffs' second set of interrogatories requested that GM identify all documents that it relied upon during the course of the negotiations. The interrogatories also asked GM to state "the highest demand made by the various State Attorneys General in the course of the negotiations with defendant and identify all factual support for such demand, as well as any documents which relate to such demand or factual support." The trial court entered an order ruling that the process of the negotiations was not open to discovery. During the fairness hearing, although the court permitted some questioning of the Assistant Illinois Attorney General about the time, place and other aspects of the negotiations, it refused to permit inquiry into what transpired during the negotiations.

GM maintains that the plaintiff-objectors waived this issue by failing to recall the Assistant Illinois Attorney General after being given the opportunity to do so. The record, however, clearly indicates that, given the trial court's limitation on the scope of examination, any further questioning by the objectors would have been futile. The objectors brought the issue to the attention of the trial court and cannot be deemed to have waived it.

This court has several times commented on the trial court's continuing duty to undertake a stringent examination of the adequacy of representation by the named class representatives and their counsel at all stages of the litigation. *McDonald v. Chicago Milwaukee Corp.*, 565 F.2d 416, 419 (7th Cir. 1977); *Susman v. Lincoln American Corp.*, 561 F.2d 86, 89-90 (7th Cir. 1977). The trial court's duty to undertake such an inquiry arises from the requirement that it find that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The trial court's duty is heightened by its responsibility to review

[20] Neither GM nor the Illinois Attorney General has argued that the conduct of the settlement negotiations is protected from examination by some form of privilege, and we find no convincing basis for such an objection here. Although particular documents or discussions conceivably could be immune from discovery as attorney work product or as privileged attorney-client communications, the existence of such privileges is best determined in the context of particular demands for discovery. Inquiry into the conduct of the negotiations is also consistent with the letter and the spirit of Rule 408 of the Federal Rules of Evidence. That rule only governs admissibility. It simply bars admission of evidence of compromise negotiations to prove liability or damages and expressly provides that it "does not require exclusion when evidence is offered for another purpose. . . ." The rule is grounded on the policy of encouraging the settlement of disputed claims without litigation. That policy is not undermined by our decision here. Participants in negotiations to settle class actions are aware that Rule 23(e) requires the trial court's approval of any settlement reached. Moreover, they are or should be aware that the court will inquire into the conduct of the negotiations. *See* Manual for Complex Litigation § 1.46 at 53-54. To the extent such inquiry discourages settlements, it should only discourage those negotiated in circumstances so irregular as to cast substantial doubt on their fairness.

the fairness of any compromise of the class action. *Id.* 23(e).[21]

The Manual for Complex Litigation provides that inquiry into the conduct of settlement negotiations is pertinent to the court's examination of the settlement. Manual for Complex Litigation § 1.46 at 53-54.[22] It recommends that before sending a notice to class members of a proposed settlement and before considering the substantive fairness of the settlement, the trial court should conduct a preliminary hearing to determine whether the proposed settlement is "within the range of possible approval." *Id.* Among the questions which merit judicial examination at the "probable cause hearing," the Manual lists:

> Who were the negotiating parties and to what extent were they authorized to proceed with the settlement of their class' claims and possibly those of other classes?[23]

Among the reasons for examining whether settlement negotiations were authorized is the danger of defendant "attorney-shopping."

> [A] person who unofficially represents the class during settlement negotiations must be under strong pressure to conform to the defendants' wishes . . . . [A]n individual, lacking official status, knows that a negotiating defendant may not like his

[21] "Before approving a settlement, therefore, the judge must assure himself that the class has been adequately represented during the settlement talks, a conclusion which will not follow automatically from a finding of adequacy for litigation purposes." *Developments in the Law—Class Actions*, 89 Harv. L. Rev. 1318, 1537-38 (1976). *See also* Wolfram, *The Antibiotics Class Actions*, 1976 A.B. Foundation Research J. 251, 361.

[22] We recognize that the Manual does not provide "an inflexible formula or mold into which all . . . pre-trial procedure must be cast." Manual for Complex Litigation at xix; *see McDonald v. Chicago Milwaukee Corp.*, 565 F.2d 416, 420 (1977). In appropriate cases, however, the Manual does provide a rough guide by which to measure whether the trial judge acted within his discretion. We rely on it in that manner here.

[23] Manual for Complex Litigation § 1.46 at 53 (Consideration 4).

> "attitude" and may try to reach a settlement with another member of the class.

Id. at 59 *quoting Ace Heating & Plumbing Co. v. Crane Co.*, 453 F.2d 30, 33 (3d Cir. 1971). Thus, unauthorized settlement negotiations create the possibility of negotiation from a position of weakness by the attorney who purports to represent the class.[24] In addition, the prestige attendant upon negotiating a large settlement against a corporate defendant and thereby acquiring reputations as consumer advocates may place public attorneys in a situation analogous to private counsel who hope to win large fee awards.[25] The possibility of such a conflict of interest as a general rule warrants judicial scrutiny of unauthorized settlement negotiations. Furthermore, settlement negotiations with less than all class counsel weaken the class' tactical position even if the attorney who enters into the negotiations attempts to represent the class' interests vigorously.[26]

[24] The court, to be sure, will not approve a settlement if it is unfair, but "fairness" may be found anywhere within a broad range of lower and upper limits. No one can tell whether a compromise found to be "fair" might not have been "fairer" had the negotiating [attorney] possessed better information or been animated by undivided loyalty to the cause of the class. The court can reject a settlement that is inadequate; it cannot undertake the partisan task of bargaining for better terms. The integrity of the negotiating process is, therefore, important.

Haudek, *The Settlement and Approval of Stockholders' Actions—Part II: The Settlement*, 23 Sw. L.J. 765, 771-72 (1969).

[25] *Cf. Developments in the Law—Class Actions*, 89 Harv. L. Rev. 1318, 1552 (1976) (noting the conflict of interest created not only by counsel seeking large fees after settlement, but also by counsel pursuing "his own ideological goals without regard to the desires of class members").

[26] A time-honored litigating tactic for a defendant encircled by multiple claimants is to weaken the total force of the attack little by little. The defendant first enters into settlements with the strongest of the plaintiffs. Then it faces the remaining plaintiffs, now isolated and abandoned, with the threat of long and lonely litigation to force a final round of settlements at terms favorable to the defendant.

Wolfram, *The Antibiotics Class Actions*, 1976 A.B. Foundation Research J. 251, 264.

Finally, unauthorized settlement negotiations deny other class counsel access to information about the negotiations which is helpful in evaluating the fairness of the settlement. "[T]he options considered and rejected, the topics discussed, the defendant's reaction to various proposals, and the amount of compromise necessary to obtain a settlement"[27] were all matters which class counsel excluded from the negotiations needed to consider before exercising their fiduciary duties to the class by accepting the settlement.[28]

The record before this court contains facts which cast some doubt on the adequacy of the representation of the class during the settlement negotiations and the fairness of the resulting settlement. These facts warranted in this instance more probing into the conduct of the settlement negotiations that the trial court permitted.

The record establishes that the settlement presented to the court by the Illinois Attorney General was either (1) negotiated without the permission of the other class counsel in the federal action as required by the court's first pretrial order or (2) negotiated by the Attorney General's office in a capacity other than class counsel *in this action.* The pretrial order prohibited the class counsel executive committee from entering into settlement negotiations without the consent of all plaintiffs' attorneys. The Attorney General's Assistant was a

[27] *Developments in the Law—Class Actions,* 89 Harv. L. Rev. 1318, 1562 (1976).

[28] *Cf. Girsh v. Jepson,* 521 F.2d 153, 157 (3d Cir. 1975):

> It is little comfort to objector Frackman that *plaintiffs'* counsel may have examined the documents sought by objector during the course of . . . discovery. As an objector, Frackman was in an adversary relationship with both plaintiffs and defendants and was entitled to at least a reasonable opportunity to discovery against both.

See also National Conference of Commissioners on Uniform State Laws, Proposed Uniform Class Action Act § 12(c)(4) *reprinted in* 32 Bus. Law. 83, 94 (1976) (notice of proposed settlement to class members shall include "a description and evaluation of alternatives considered by representative parties").

member of the committee and therefore subject to the pretrial order's restrictions. Nevertheless, he participated in negotiations with GM without the consent of other counsel.

If the negotiations did proceed in violation of the trial court's pretrial order,[29] we think that the plaintiff-

[29] The trial court found that at least some private counsel knew of the negotiations between GM and the Attorneys General in advance of the settlement. The knowledge of some counsel, however, falls short of the authorization contemplated by the trial court's pretrial order. That order authorized the class counsel executive committee to conduct negotiations, but only with the consent of all counsel for the named plaintiffs. The trial court made no finding that all class counsel were aware of the negotiations between GM and the Attorneys General. Moreover, knowledge of the existence of the negotiations does not necessarily indicate consent to the negotiations for the purpose of settling the federal action. We do not question the right of the state Attorneys General to settle their parallel state lawsuits against GM without the approval of private counsel in the federal class action. Their authority to do so is unquestioned even though the settlement of state actions may have some collateral impact on the federal action, *e.g.,* reducing the size of the class by affording relief to some class members. Here, however, the negotiations were conducted not only to settle the state actions, but also to settle the federal class action. We find no indication in the record that private counsel were aware that the negotiations would have such a broad effect until immediately before the announcement of the GM-Attorneys General agreement.

After the submission of the proposed settlement agreement, six of the private counsel in the federal action did agree to support the settlement. The district court relied on the plaintiff-proponents' support as a factor indicating both the absence of prejudice from the circumstances of the settlement's negotiation and the settlement's fairness. *See* Manual for Complex Litigation § 1.46 at 53 (Consideration 5). The support of some private counsel after being presented with the agreement as a *fait accompli* does not amount to a ratification of the conduct of the negotiations. As noted *supra,* class counsel should know the options considered and the topics discussed during the negotiations before supporting a settlement as fair. In the absence of such familiarity of counsel with the conduct of the settlement negotiations, the inference of fairness to be drawn from their support is weak. *Cf. id.* at 64 ("a plan should not be approved simply because counsel on both sides recommend it").

objectors were entitled to discovery to determine whether the negotiations may have prejudiced the interests of the class. Moreover, even if discovery failed to reveal identifiable prejudice, the exclusion of the private counsel from the settlement negotiations should weigh heavily against approval of the settlement. "[T]he excluded plaintiff might well have improved the settlement terms, and while this may be hard to demonstrate, the proponents of the compromise should not be helped by a difficulty of proof created by their improper conduct." Haudek, *The Settlement and Approval of Stockholders' Actions—Part II: The Settlement*, 23 Sw. L.J. 765, 770 (1969).[30]

The Assistant Illinois Attorney General maintains, however, that his participation in negotiations between the state Attorneys General and GM did not violate the pretrial order because he was not negotiating as a class representative in the action in the federal court but rather was negotiating as a representative of the State of Illinois in the parallel state proceedings in the Circuit

[30] Thus, although the proponents of any class settlement always bear the burden of proof on the issue of fairness, Manual for Complex Litigation § 1.46 at 56, proponents who improperly negotiate a settlement should bear the heavier burden of establishing fairness by clear and convincing evidence. This does not unduly hamper settlements since the disapproval of the settlement always permits the renewal of negotiations between *all* of the proper participants in the class action. The question of prejudice aside, it is clear that the trial court did not require the proponents of the settlement proposed here to meet such a heavy burden. In fact, the trial court accepted the proposed settlement as *prima facie* fair and shifted to the objectors at least the burden of producing evidence disproving the fairness of the settlement. Whether the trial court shifted the burden of persuasion to the objectors as well is unclear. The objectors complain that it did and the Illinois Attorney General's brief seems to concede the point. The trial court's conclusions of law, however, recite that it placed the burden of persuasion on the proponents. Our comparison of the record with the findings of fact leads us to believe that as to some of the court's findings that it may indeed have misplaced the burden.

Court of Cook County.[31] The motion of the Illinois Attorney General for leave to file the settlement took this position also, although the motion's first paragraph based the Attorney General's capacity to present the motion on his status as counsel for the State of Illinois,

[31] During the fairness hearing, Mr. Mulack, the Assistant Illinois Attorney General, described his position as one in which he wore "two hats."

> [T]he Attorney General filed a State Court action . . . in the Circuit Court of Cook County, on March 7th of 1977. . . . [T]wo weeks later we filed the Federal Action. So as I told the Court, on several occasions, as we had appeared here during the motions on behalf of the class certification, I was wearing two hats—and the Attorney General of Illinois was, likewise, wearing two hats; one as a plaintiff, under the State Court action, under the Consumer Fraud Act, in the Circuit Court of Cook County, and the other as a punitive class representative in the Federal Court Action. . . .
>
> I was perfectly aware of the limitations in Pre-Trial Order No. 1, that prohibited either myself or any representative of the Attorney General's office from taking part in nationwide negotiations on this particular class action. With that particular concern and that understanding, I had approached the posture of the overall negotiations.
>
> Now, attendant at those meetings were Assistant Attorneys General literally from every state that had a major action going against General Motors. Each of those Attorneys General were there in their state capacity only—they were only concerned about their state lawsuits, as I was concerned, only, about my state lawsuit.
>
> At the opening salvo—the opening introductions of the settlement negotiations—as people were being introduced, and from which state they attended, and as General Motors' attorneys were being introduced, as I was being introduced, I made this caveat on the record, that "I'm here only as an Assistant Attorney General on behalf of the State of Illinois case; I am not here, at all, as any class representative, or on behalf of the nationwide action; and if any discussions are brought up about the nationwide class action, I cannot participate, because that is not my function." With that caveat, we proceeded to discuss those particular matters attendant to the settlement.

(Footnote continued on following page)

one of the designated class representatives in the federal action. Also consistent with his position that he did not participate in the settlement negotiations as a federal class representative, the Assistant Attorney General admitted during the fairness hearing that the Illinois Attorney General's office did not obtain consent to the settlement from the over 100 named private plaintiffs that the Illinois Attorney General represented in the federal action.

The State of Illinois is a representative party in this suit solely because it purchased a 1977 Oldsmobile with a Chevrolet engine. The Illinois Attorney General's ability to maintain the suit on Illinois' behalf as a class action is governed solely by Rule 23.[32] In the absence of statutory authorization, Illinois cannot maintain this action in federal court as a *parens patriae* action.[33]

[31] *continued*

We note that the written settlement agreement between GM and the Attorneys General devoted much space and went into considerable detail reciting the rights and obligations of the parties to the negotiations with respect to the settlement of the *federal* action. For example, the agreement, mentioning the Magnuson-Moss class action by name, required the Attorneys General, *inter alia*, to seek amendment of the class certification to conform with that group of consumers to whom GM would extend its offer, to represent to the trial court that the proposed settlement was fair and reasonable, and to recommend that the court approve the settlement of the entire action in accordance with the terms of the agreement.

[32] *See State of Iowa v. Union Asphalt & Roadoils, Inc.*, 281 F. Supp. 391, 401-02 (S.D. Iowa 1968); *State of Minnesota v. United States Steel Corp.*, 44 F.R.D. 559, 576 (D. Minn. 1968).

[33] *Cf. Hawaii v. Standard Oil Co.*, 405 U.S. 251, 266 (1972) ("*Parens patriae* actions may, in theory, be related to class actions, but the latter are definitely preferable in the antitrust area. Rule 23 provides specific rules for delineating the appropriate plaintiff-class, establishes who is bound by the action, and effectively prevents duplicative recoveries").

The class action, although it also provides a vehicle for furthering the substantive policies behind legislation, is primarily a device to vindicate the rights of individual class

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Assuming *arguendo* that the Attorney General's office did not violate the pretrial order and thus participated in the negotiations solely as a representative in the parallel state court action, we believe, nevertheless, that the trial judge should have opened up the negotiations to scrutiny, if only to dispel the questions which naturally arise from the unusual posture of the case. If the settlement was not negotiated by authorized class counsel in the capacity of class counsel in this action, than it was negotiated in the name of, at best, only one of the named plaintiffs in the federal action, the State of Illinois. This stretches the theory of representation of absentee interests by the named plaintiff to its limit[34] and warrants searching judicial examination of the circumstances surrounding and the matters discussed during the settlement negotiations before acceptance of the proposed settlement for possible approval.

[33] *continued*

members. We also note that the Magnuson-Moss Act does provide that the United States Attorney General and the Federal Trade Commission may go to federal court to enjoin violations of the Act. 15 U.S.C. § 2310(c). Thus the Act provides its own mechanism for protecting the general public's interest in enforcement of its provisions. It does not leave protection of the public interest up to the Attorneys General of the fifty states. *Compare* 15 U.S.C. §§ 15a-15h (explicitly vesting power in state Attorneys General to maintain actions against persons engaged in anti-competitive practices which harm state consumers).

[34] In their briefs and during oral argument the parties devoted a good deal of time to a discussion of whether a settlement could be approved over the objections of some of the named plaintiffs. We agree with General Motors that the unanimous approval of all named plaintiffs is not a prerequisite to judicial approval of a settlement approved by some of the named plaintiffs. *See McDonald v. Chicago Milwaukee Corp.*, 565 F.2d 416 (7th Cir. 1977). This case does not present, and we need not here decide, GM's admittedly extreme position taken during oral argument that the trial court can approve a settlement offered unilaterally by a class action defendant with the approval of neither a class representative nor class counsel. Here, at least the State of Illinois, a named plaintiff, agreed to settle.

Several additional facts suggest that the representation of the class during the negotiations was less than vigorous. The class settlement was reached relatively early in the course of the action.[35] The federal action had been filed about nine months before; the class had been certified only two months before; and notice to class members of the pendency of the action had not even been mailed. Although discovery had commenced, GM's answers to many of the requests were less than completely responsive. Moreover, because the proposed settlement contemplated the release of all claims relating to component substitutions, not just the engine interchanges, the range of possible damages to class members was unclear. It is not possible to tell from the record how fully informed the Attorneys General may have been about the value of the claims they were surrendering.[36]

Not only was the settlement arguably hasty, but also the settlement agreement contemplated the abandonment of the prosecution of the claims of post-April 10 class members.[37] The settlement agreement entered into by the Attorneys General obligated them to seek settlement of the entire class action even though the agreement obligated GM to offer payments to only part of the certified class. The agreement contemplated narrowing the class certified to those who purchased Oldsmobiles before April 11, 1977, despite the original certification of the class to include those who purchased before October 13. GM subsequently formally moved the court for such a revised class definition to conform to

[35] *See* Manual for Complex Litigation § 1.46 at 53 (Consideration 1).

[36] *Id.* (Considerations 2 & 3). The record does not reveal and the briefs of the parties do not detail the extent to which the Attorneys General had proceeded with discovery in their parallel state actions or whether they examined the value of the claim for the entire power train. The trial court's order precluding discovery of the conduct of the settlement negotiations, of course, prevented the objectors from making such a record. To this day, we have no idea how the participants in the negotiations arrived at the settlement package of $200 plus the extended power train warranty.

[37] *See id.* at 54 (Consideration 6).

the settlement agreement. The court denied GM's motion, but did decide to create a subclass for settlement purposes. Although the abandonment by the Attorneys General of the claims of post-April 10 purchasers does not by itself warrant the reversal of the settlement of the claims of the pre-April 11 purchasers, it does indicate that the representation during the negotiations may have been inadequate as to all Oldsmobile purchasers who constituted the original class.[38]

[38] We must note that the means by which the trial court attempted to create a subclass also may have seriously jeopardized the rights of the post-April 10 purchasers. Aside from the tactical disadvantage of having their claims separated from the claims of the other class members, the subclassing technique chosen by the court raises doubts about whether those outside the ambit of the settlement could maintain a class action after the settlement with the pre-April 11 subclass.

The trial court has broad discretion in determining whether to allow a class action to be maintained, *Jimenez v. Weinberger*, 523 F.2d 689 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976), *King v. Kansas City Southern Industries, Inc.*, 519 F.2d 20 (7th Cir. 1975), and must necessarily have an equally broad range of discretion in determining whether to create subclasses pursuant to Fed. R. Civ. P. 23 (c)(4)(B). Division of a class or potential class into subclasses to account for differences in proof that may be required at trial is clearly permissible. *See, e.g., Dorfman v. First Boston Corp.*, 62 F.R.D. 466, 476 (E.D. Pa. 1973) (creating subclasses to account for differences between class members who purchased before and after relevant information received wide public circulation). The trial court's discretion, however, is bounded by the requirements of the applicable law and in this case we believe that the trial court overstepped the bounds of the Federal Rules of Civil Procedure.

The trial court's order creating the settlement subclass did not conform to the requirements of Rule 23 which provides in pertinent part that when appropriate "a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly." Fed. R. Civ. P. 23(c)(4)(B). The rule contemplates that at least two subclasses will be formed and requires that each independently meet the requirements of Rule 23 for the maintenance of the class action. *See Monarch Asphalt Sales Co. v. Wilshire Oil Co.*, 511 F.2d 1073, 1077 (10th Cir. 1975).

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One final matter casts doubt upon the circumstances in which the settlement was negotiated by the Attorneys General. The settlement agreement contains GM's promise to compensate the Attorneys General $150,000 "for all the expenses they have incurred in connection with the subject matter of this Agreement." Allocation of the proceeds is left solely to the Attorneys General. The agreement also commits GM to pay private attorneys' fees in the federal action "in an amount no greater than the amount of documented time actually expended . . .

[38] *continued*
The trial court made no finding that the post-April 10 subclass could be maintained as a class action. The record shows instead that the trial court attempted to create a single subclass for the settlement, leaving the post-April 10 purchasers in the original class. No attempt was made to test whether the nonsettlement subclass action met the requirements of Fed. R. Civ. P. 23(a) & (b). Furthermore, the record does not indicate whether any named plaintiff in the current action is even in the nonsettlement subclass. The subclass could be "headless," thus raising serious questions about whether the trial court could proceed to consider the post-April 10 claims. *See generally Winokur v. Bell Federal Savings & Loan Association*, 560 F.2d 271 (7th Cir. 1977), *cert. denied*, 435 U.S. 932 (1978); *Susman v. Lincoln American Corp.*, 587 F.2d 866 (7th Cir. 1978); *Satterwhite v. City of Greenville*, 578 F.2d 987 (5th Cir. 1978) (en banc); *Goodman v. Schlesinger*, 584 F.2d 1325 (4th Cir. 1978). Even if a named plaintiff is before the trial court, no showing has been made that he desires to or will adequately represent the subclass.

The uncertainty about the viability of the subclass action on behalf of class members who purchased their cars after April 10, 1977, is significant. The notice to these subclass members informing them of the pendency of the action has been sent out. The subclass members, therefore, may rely on the federal class action to vindicate their interests. If it is later determined that the action cannot be maintained, the statutes of limitation may preclude individual lawsuits in the state courts.

The questions raised about the viability of the subclass action if the settlement of the other subclass action is executed illustrate the inadvisability of creating tentative subclasses for settlement purposes without careful examination of the adequacy of the representation of *each* subclass. *Cf.* Manual for Complex Litigation § 1.46 at 59-61 (condemning tentative classes for settlement purposes).

multiplied by the hourly fee prevailing . . . in the community." These amounts were in addition to the amounts promised class members accepting the settlement. The notice to subclass members informed them of even less than was provided by the agreement,[39] and the record does not provide any reliable estimate of the aggregate amount of attorneys' fees and expenses that GM will eventually pay.[40] We think the proposed settlement's estimate of attorneys' fees and expenses is so vague that subclass members could not determine the possible influence of attorneys' fees on the settlement in considering whether to object to it.[41]

[39] The notice to subclass members merely stated:

> As part of the Agreement with the Attorneys General, General Motors agreed to pay an aggregate amount of $150,000, to be divided among those Attorneys General, including the Attorney General of Illinois, accepting the Agreement, in payment for expenses claimed to have been incurred in connection with the subject matter of their litigation. The amount of any attorneys' fees, costs or expenses to be paid to the attorneys for the private plaintiff purchasers in the class litigation will be subject to the review and approval by the Court. Any award of costs, expenses and/or fees to the private plaintiff purchasers and their counsel in the class litigation will be in addition to, and *not* deducted from, the $200.00 offered by General Motors per automobile purchased as part of the proposed settlement.

[40] The record does indicate that GM and six of the nine teams of private attorneys have reached an understanding, if not agreement, about attorneys' fees. The understanding is that GM will not object to a request by those counsel for fees up to $360,000, but that private counsel are free to request that the court award a larger amount. Like the provision for expenses of the Attorneys General, this understanding leaves the allocation of the payment a matter for determination by the recipients of the payment. The agreement apparently contemplates that no requests for fees will be made until the end of all of the litigation, including that concerning the rights of post-April 10 purchasers.

[41] *See* Manual for Complex Litigation § 1.46 at 54 (Consideration 7).

Aside from some doubt about whether Attorneys General who, of course, are compensated by the public may ever recover attorneys' fees and expenses,[42] we believe that the method by which the GM-Attorneys General agreement contemplates payment of private attorneys' fees and expenses is questionable. The Manual condemns settlement agreements which provide

> that the fees and sometimes expenses of plaintiffs' counsel are to be paid separately by the defendant(s) over and above the settlement. Frequently, the amount thereof is not disclosed at the time the settlement is proposed. Such an arrangement should not be permitted. All amounts to be paid by the defendant(s) are properly part of the settlement funds and should be known and disclosed at the time the fairness of the settlement is considered.
>
> The effect of such an arrangement is to neutralize the court's power and responsibility to pass upon the reasonableness of the amounts to be paid to plaintiffs' counsel since any reduction by the court

[42] The Manual regards the question of whether publicly employed counsel may be allowed reimbursement for expenses as an "interesting" and apparently open one. *Id.* § 1.44 at 42. It notes that expenses and attorneys' fees have been allowed to state Attorneys General in several class action settlements. *See also In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions*, 410 F. Supp. 706 (D. Minn. 1975). On the other hand, several district courts have preferred state Attorneys General as counsel in class actions, in part because the Attorneys General presumably would not seek attorneys' fees. *See State of Illinois v. Harper & Row Publishers, Inc.*, 301 F. Supp. 484, 494-95 (N.D. Ill. 1969); *State of Minnesota v. United States Steel Corp.*, 44 F.R.D. 559, 577 (D. Minn. 1968); *cf. State of Ohio v. Richter Concrete Corp.*, 69 F.R.D. 604 (S.D. Ohio 1975) (permitting state Attorney General to communicate with putative class members after class certification was denied because salaried Attorney General, unlike private attorneys, had no interest in soliciting litigation or fees). We need not meet the question posed by the Manual. On this record it is not clear that the expenses of the Attorneys General to be reimbursed are those incurred in the litigation before the federal court. It is fair to assume that a large proportion of the expenses, if not all, are due to state court litigation.

> in the amount counsel agree upon after the class settlement has been approved will simply go to reduce the aggregate amount defendant(s) will pay and will not increase the amount to be paid to the plaintiffs. As a result, there is little incentive for the judge to reduce the agreed upon fees. On the other hand, the effect of such an arrangement may be to cause counsel for the plaintiffs to be more interested in the amount to be paid as fees than in the amount to be paid to the plaintiffs. Only if the aggregate of all payments to be made by defendants is disclosed in the proposed settlement can the class members and the court make any intelligent judgment as to the fairness and reasonableness of a proposed settlement.

Manual for Complex Litigation § 1.46 at 62. This court has previously declined to upset a settlement agreement merely because some problems regarding fees and expenses remained unresolved. *See McDonald v. Chicago Milwaukee Corp.*, 565 F.2d 416, 426 (7th Cir. 1977). We do not overrule that decision, but do regard the questionable provision made for expenses and attorneys' fees as one factor requiring examination of the settlement negotiations.

In conclusion, we hold that the trial court abused its discretion by failing to undertake a careful examination of the conduct of the settlement negotiations and by preventing the plaintiff-objectors from showing that the negotiations prejudiced the best interests of the class. Regardless of which of the two possible capacities the Illinois Attorney General's office assumed in negotiating the proposed settlement, the conduct of the negotiations was irregular and the record contains too much evidence tending to indicate prejudice to the class to permit us to allow the trial court's order to stand. Because, however, our decision upsets a settlement of considerable magnitude and because complex class actions are often, although not always, settled before trial, we conclude with a discussion of what we do not hold.

We do not hold that irregular settlement negotiations may never form the basis for a judicially acceptable class action settlement. In fact, a prior decision of this court has approved a settlement negotiated in somewhat similar circumstances. *See McDonald v. Chicago Milwaukee Corp.*, 565 F.2d 416 (7th Cir. 1977).[43] We realize that the system of state and federal courts often generates simultaneous litigation over the same subject matter. We recommend that an attorney who is counsel in both state and federal actions request leave of court before entering into settlement negotiations. In addition, the trial court should probably require as a condition to such leave at least that the attorney inform other counsel in the proceedings of the matters discussed during the separate negotiations. Although this practice is preferable, the failure to follow it is not necessarily reversible error if the record clearly indicates that representation of the class during the negotiations was adequate and that the settlement itself is fair.[44]

[43] In *McDonald* the objectors to a settlement contested, *inter alia*, the negotiations conducted in connection with a related state court action. The negotiations had begun prior to the commencement of the federal action which was filed only after the negotiations broke down, 565 F.2d at 420. Negotiations resumed prior to class certification, but largely because the trial court delayed certification of the class during the negotiations. Significantly, the trial court was never afforded an opportunity to pass on the issue of the propriety of the negotiations because the objector failed to raise the issue there.

In this case, a pretrial order expressly limited the conduct of settlement negotiations. The objectors raised the issue before the trial court by seeking discovery and by questioning the Assistant Illinois Attorney General during the fairness hearing. The trial court when given a chance to consider the conduct of the negotiations ruled that the matter was irrelevant. Finally, the record contains some evidence suggesting that the settlement negotiations prejudiced the class.

[44] Although the trial court concluded that the settlement of the subclass action was fair, our discussion of the conduct of the settlement negotiations necessarily casts doubt upon that conclusion. Moreover, that matter aside, we are not convinced that the court's conclusion finds clear support in the record.

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[44] *continued*

The most important factor relevant to the fairness of a class action settlement is the strength of plaintiff's case on the merits balanced against the amount offered in the settlement. Manual for Complex Litigation § 1.46 at 56. Conceptually, this requires a comparison of the amount offered with the product of (1) the probability of plaintiff's prevailing on the merits times (2) the present value of probable damages plaintiff would recover if he did prevail. We do not expect the trial court's conclusions to be set forth with mathematical precision. A fairness hearing is not a trial on the merits. The trial court, however, does have a duty to members of the class and to the reviewing court to assess, if not decide, the issues of law which weigh heavily in the above calculus and to consider the most probative evidence bearing on those issues.

The trial court's findings contain no express discussion of the merits of the Magnuson-Moss claim. Indeed, with respect to the alleged transmission switch in Delta 88s, the court apparently misapprehended the nature of the objectors' claims. The court noted that all Delta 88 coupes and sedans contained the THM 200 regardless of whether they had Chevrolet or Oldsmobile engines. The gist of objectors' claim, as we understand it, is that the transmissions used simply were not those warranted. Thus, the fact that all Delta 88 sedan and coupe purchasers received the smaller transmission is irrelevant. If objectors' contention is correct, GM breached its warranty to all Delta purchasers, not just those who received Chevrolet engines.

On the issue of compensatory damages, the trial court framed the issue as the "comparability" of the Oldsmobile engines allegedly warranted and those Chevrolet engines received. The findings then recite a mass of technical data indicating that the durability, performance and fuel economy of the Chevrolet and Oldsmobile engines were not materially different. The evidence on these technical issues was conflicting, but we are more concerned by the district court's failure to apply the ordinary measure of damages for breach of warranty: "the difference . . . between the *value* of the goods accepted and the *value* they would have had if they had been as warranted. . . ." U.C.C. § 2-714(2) (emphasis added). This is presumably the measure of damages contemplated by the drafters of the Magnuson-Moss Act. Yet, the court found it unnecessary to resolve an evidentiary conflict on the value of the engines. The objectors presented evidence tending to establish a difference in value of over $400. GM presented evidence that the cost of manufacture was virtually the same. Although neither form of evidence was the "best" evidence of value, this is a matter upon which the proponents of the settle-

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[44] *continued*
ment had the burden of proof. Manual for Complex Litigation § 1.46 at 56. The trial court should have made a more precise estimate of probable compensatory damages. *Cf. id.* at 61 ("in view of the complexity which ordinarily attends settlement issues, it is wise in most cases to rely upon proven facts, particularly economic facts").

Finally, we question the court's resolution of the possibility of recovering punitive damages against GM. The court declined to consider whether punitive damages are recoverable under the Magnuson-Moss Act because it found the evidence insufficient to permit an inference that GM acted in willful disregard of the rights of Oldsmobile purchasers. We think the objectors presented substantial evidence tending to show that GM deliberately concealed the source of the engines in the cars that it sold as Oldsmobiles and that it did so to increase profits. Moreover, we cannot say that the possible recovery of punitive damages should not have received any weight because they were unavailable under the Magnuson-Moss Act. Although one opinion published after the trial court's approval of the settlement intimates that the Act does not permit punitive damages, it does not resolve the issue. *See Novosel v. Northway Motor Car Corp.*, 460 F. Supp. 541 (N.D.N.Y. 1978). In any event, that decision is binding on neither this court nor the district court. The Act itself provides "for damages and other legal and equitable relief." 15 U.S.C. § 2310(d)(1). Although this broad language falls short of express statutory authorization for an award of punitive damages, we do not believe as GM does that punitive damages are never recoverable under federal law unless expressly authorized. *See Globus v. Law Research Service, Inc.*, 418 F.2d 1276, 1284 (2d Cir. 1969), *cert. denied*, 397 U.S. 913 (1970); Comment, *Punitive Damages Under Federal Statutes: A Functional Analysis*, 60 Calif. L. Rev. 191 (1972). Although the legislative history of the Act is silent on the matter, we think it is not unlikely that Congress intended to provide at least the same relief available under state law for breach of warranty. Although punitive damages are usually unavailable for actions sounding in contract, *see* U.C.C. § 1-106(1), *McGrady v. Chrysler Motors Corp.*, 46 Ill. App. 3d 136, 360 N.E.2d 818 (1977); *Hibschman Pontiac, Inc. v. Batchelor*, 340 N.E.2d 377 (Ind. App. 1976), this general rule is subject to exceptions. Punitive damages may be awarded, for example, when the breach amounts to an independent tort or is accompanied by fraudulent conduct. *See* Sullivan, *Punitive Damages in the Law of Contract: The Reality and the Illusion of Legal Change*, 61 Minn. L. Rev. 207 (1977); 3 Williston on Sales § 25-13 (4th ed. 1974); R. Nordstrom, Sales § 155 (1970).

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Similarly, we do not hold that the failure of the trial court to hold a preliminary hearing prior to the mailing of the notice of the proposed settlement is inevitably reversible error. Although we believe such a hearing is better practice and the Manual for Complex Litigation recommends it, this court has gone as far as to affirm the approval of a settlement when no evidentiary hearing on its fairness was held before or after the notice to the class. *See Patterson v. Stovall*, 528 F.2d 108 (7th Cir. 1976). We do hold the record in this case raises so many questions about the adequacy of representation during the settlement negotiations that we cannot say the record clearly supports the trial court's conclusion that the negotiations did not prejudice the interests of the settlement subclass.[45]

We noted in *McDonald v. Chicago Milwaukee Corp.*, 565 F.2d 416, 422 (7th Cir. 1977), that "*Per se* rules often represent the abdication of judicial discretion rather than its informed exercise." Consequently, this court has declined to adopt *per se* rules rigidly confining the trial court's exercise of its discretion in the supervision of class actions. This does not relieve us, however, of our duty to reverse the trial court's judgment when we are convinced that there has been a clear showing of an abuse of that discretion. On the facts of this case, the irregular conduct of the negotiations, the failure of the trial court to examine the irregularities thoroughly, and

[44] *continued*
We do not decide here that an award of punitive damages is appropriate under the Magnuson-Moss Act or that if it were that class members would be entitled to them. We do believe, however, that the possibility of such a recovery is not insubstantial and that this possibility as well as the probable compensatory damages were given insufficient weight by the trial court in the calculus of the fairness of the settlement.

[45] Thus, we do not hold that the representation of the class members during the negotiations was in fact inadequate. The record simply does not provide any basis for us to tell. We do note, however, that this is not the first class action in which the State of Illinois has negotiated a settlement without the participation of other counsel representing the class. *See Liebman v. J. W. Petersen Coal & Oil Co.*, 73 F.R.D. 531 (N.D. Ill. 1973).

the evidence in the record indicating that the irregularities may have damaged the interests of the class convince us that such a clear showing has been made. The judgment of the trial court approving the settlement, accordingly, must be reversed.

V. Form of the Settlement

Even if we were not constrained to reverse the trial court's approval of the settlement because of the circumstances surrounding its negotiation, we would have to find the settlement defective in another respect. Although the defect may affect only a small portion of those to whom GM's offer would be extended, convenience and expediency cannot justify the disregard of the individual rights of even a fraction of the class. As an appellate court we are without power to rewrite the settlement of the parties. We only have the authority to approve or disapprove the settlement in the form it is presented to us.[46]

The settlement order gives subclass members two options. If the subclass member signs a release he will receive the settlement package and his Magnuson-Moss claim will be dismissed.[47] But even if the subclass member refuses to accept GM's offer and refuses to sign the release, the order nevertheless dismisses *with prejudice* the subclass member's federal claim.[48] The

[46] *Patterson v. Stovall*, 528 F.2d 108, 111 (7th Cir. 1976).

[47] The signed release, of course, operates to preclude the accepting subclass member from proceeding on any state claims he may have against GM.

[48] The relevant paragraphs of the trial court's order provide:

> 4. The action on behalf of subclass members who accept and receive the settlement shall be and is hereby dismissed as to defendant General Motors with prejudice.
>
> 5. The action on behalf of subclass members who do not accept the settlement shall be and is hereby dismissed as to defendant General Motors. Dismissal as to those persons shall be without prejudice solely to their rights to pursue such other remedies as may be otherwise available to them.

subclass member is presented with an accept-or-else situation: if he does not accept, his federal claim is lost even though he cannot receive the benefits of the settlement package. We have searched the reported decisions in vain for precedent for such a settlement. Finding none and being of the opinion that the dismissal of the action is fundamentally unfair to nonconsenting subclass members, we cannot permit the settlement in its present form to stand.

GM argues that the form of the settlement is not unusual. It argues that nonconsenting class members are bound by a class settlement even if it is approved over their objections. Moreover, it argues, the very purpose of the 1966 amendments to Rule 23 was to eliminate the spurious class action in which potential class members could obtain the rewards of a favorable suit, but escape being bound by an unfavorable outcome. Thus, GM would have us hold that the dismissal of the Magnuson-Moss claims of nonconsenting subclass members is permissible. Finally, GM goes on to argue that "[t]he settlement does allow class members, even at this late stage, to reject it and pursue state law remedies. To the extent nonconsenting class members are allowed to pursue any future litigation rights by the settlement . . . it is more favorable to them than federal law or policy require." We do not disagree with GM's arguments in the abstract. In the context of the particular settlement here which attempts to settle both state and federal claims, however, we must disagree.

We consider GM's last argument first. A fundamental characteristic of the federal courts is their limited jurisdiction. In the same pretrial order in which the trial court certified the class, it also expressly declined to take pendent jurisdiction over the state claims presented by the pleadings. Therefore GM's contention that the settlement was more favorable than federal law requires presumably because the trial court could have forced subclass members to accept the settlement package in return for all state and federal claims is without merit. The trial court, having declined jurisdiction over the state claims, was without power to extinguish them. The form of settlement with its unusual

use of individual releases was apparently agreed to by GM and the Attorneys General in recognition of the federal court's inability to settle the state claims of subclass members.[49] The opt-out provision which permits nonconsenting subclass members to pursue state remedies is a necessary consequence of the limited jurisdiction of the federal courts.

We do not disagree with GM's statement that class members can be bound by a settlement over their objections and that the same is true of objecting named plaintiffs.[50] Similarly, we agree that Rule 23 was

[49] The use of individual releases to effectuate a class action settlement, although unusual, is not unprecedented. *See* 3 H. Newberg, Class Actions § 5620p (1977).

[50] In a brief amicus curiae the Congressional sponsors of the Magnuson-Moss Act, Senator Warren G. Magnuson and Representative John E. Moss, also attack the form of the settlement approved by the trial court. The Congressional sponsors maintain that the class members' federal rights under the Act cannot be settled or compromised by a class representative without each class member's individual consent. They would have us hold that to the extent that Fed. R. Civ. P. 23(e) authorizes the settlement of class actions over the objections of some class members, it is inapplicable to class actions maintained under the Magnuson-Moss Act. Because we find that the form of settlement in the case at bar was not authorized by the Federal Rules, discussion of this argument is not strictly necessary to our decision. We discuss the issue raised, however, so as not to discourage settlement of the present action after its return to the district court.

The Federal Rules of Civil Procedure provide, with exceptions not important here, that they shall "govern the procedure in the United States district courts in *all* suits of a civil nature. . . ." Fed. R. Civ. P. 1 (emphasis added). Although Congress unquestionably has the power to supersede any federal rule either in its entirety or in particular types of civil actions, we think that the proper rule of construction is that the Congressional intent to repeal a federal rule must be clearly expressed before the courts will find such a repeal. *See United States v. Gustin-Bacon Division, Certainseed Products Corp.*, 426 F.2d 539, 542 (10th Cir.), *cert. denied*, 400 U.S. 832 (1970). We think neither the language of the Magnuson-Moss Act nor its legislative history clearly manifests Congress' intent to supersede Rule 23(e).

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amended to eliminate the spurious class action. We do not think that it follows, however, that the trial court has the power under Rule 23 to dismiss with prejudice the Magnuson-Moss claims of those subclass members who refuse to accept the settlement package. As to them, the "settlement" is not a settlement; it is merely an offer to settle with a penalty, the dismissal of their federal

[50] *continued*

The Act itself refers to Rule 23 twice. In both cases, however, it merely provides that in class actions maintained in the federal courts, Rule 23 will govern whether the named plaintiff is a proper party to represent the class. 15 U.S.C. §§ 2310(a)(3), 2310(e). The explicit mention of the applicability of Rule 23 bolsters our conclusion that Rule 23(e) is applicable to class actions maintained under the Act. We do not find the negative pregnant that the Congressional sponsors find. Nor do the Act's provisions encouraging informal dispute resolution necessarily preclude the later settlement of a class action without individual consent by each class member. Indeed, it would be unreasonable to construe an act whose purpose is to encourage settlement to preclude settlement as a practical matter after a class action is commenced.

The legislative history of the Act also fails to evince a Congressional desire to prohibit class action settlements without the consent of every class member. That history instead suggests that Congress has precisely the opposite intention.

> Generally speaking, with specific exceptions set forth in the bill, the procedures are to utilize Rule 23 of the Federal Rules of Civil Procedure. For instance, in negotiating the use of any complying informal dispute settlement procedure or any other settlement procedure, the representative party would negotiate on behalf of the 100 named plaintiffs and any other class members.

120 Cong. Rec. 40712 (1974) (remarks of Sen. Moss). The legislative history does indicate some dissatisfaction with the Supreme Court's decision in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), and perhaps indicates Congress' intention to make Rule 23(c)(2) inapplicable in some class actions maintained under the Magnuson-Moss Act. *See* H.R. Rep. No. 93-1107, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 7702, 7724. No issue about the need for notice, however, has been raised in this appeal so we need not decide this question. We decide simply that the Magnuson-Moss Act does not alter the general rule that the trial court may approve a class action settlement without the consent of every member of the class.

claims, if they do not accept. We decline to put every subclass member to such an unfair choice.

This court on two occasions has noted that the essence of a settlement is a bilateral exchange. "The inherent nature of a compromise is to give up certain rights or benefits in return for others." *McDonald v. Chicago Milwaukee Corp.*, 565 F.2d 416, 429 (7th Cir. 1977). "A settlement by its very nature is an agreement where both sides gain as well as lose something." *Patterson v. Stovall*, 528 F.2d 108, 115 (7th Cir. 1976). By the terms of the order of the trial court, subclass members who do not sign the release give up their Magnuson-Moss claims and the opportunity to be represented in the class action in return for nothing.[51] The right to pursue state remedies is not a benefit, because, as discussed above, the class members possessed state causes of action against GM independently of the federal litigation and the federal court is without power to extinguish those state-created remedies. GM gains the dismissal of each subclass member's federal claim, but surrenders nothing in return.

The federal claims of individual class members cannot be extinguished with neither adequate consideration in return nor a hearing on the merits of their claims. The dismissal of nonconsenting subclass members' claims would serve solely to benefit GM or those subclass members who accept the settlement. Reconciling such a "settlement" with notions of fair play and justice is impossible. To permit the trial court to exercise its power to approve class action settlements in this manner would contravene the Rules Enabling Act, 28 U.S.C. § 2072, by abridging the substantive rights of those who did not accept the settlement offer.

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[51] The form of settlement in the case at bar is quite different than a settlement in which the defendant's liability is stipulated and class members must make claims against the settlement fund. In the latter case, the cause of action of a class member who fails to file a claim is extinguished by the settlement, and his right to a recovery is lost because he sleeps on his rights. In this case, the cause of action of a subclass member is extinguished and his right to a recovery is lost because he stands on his rights under state law.

Our objection to the form of settlement in this case is similar to the Second Circuit's objection to "fluid class recovery." *See Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005 (2d Cir. 1973), *vacated and remanded on other grounds*, 417 U.S. 156 (1974); *Van Gemert v. Boeing Co.*, 553 F.2d 812 (2d Cir. 1977). *See also In re Hotel Charges*, 500 F.2d 86 (9th Cir. 1974). In *Eisen* the Second Circuit's rejection of the use of fluid class recovery rested at least in part on the court's concern that that form of recovery would drastically increase the class action defendant's substantive liability. *Cf. Beecher v. Able*, 575 F.2d 1011, 1016 n.3 (2d Cir. 1978) (defendant may agree to a settlement which provides for fluid class recovery). In this the converse situation, the form of settlement drastically reduces, in fact extinguishes, the subclass member's substantive cause of action under the Magnuson-Moss Act.[52] We hold the trial court's approval of the form of settlement here was unauthorized by the Federal Rules and was inconsistent with the trial court's responsibility to act as the protector of the interests of absentee class members.

We cannot hold that the dismissal of the federal claims of those who refuse to accept the settlement offer was insignificant because it merely closed one of the two avenues of recovery against GM. Relegating the nonconsenting subclass member to his state remedies severely reduces his chances of obtaining an adequate recovery on his claim.

The nonconsenting subclass member loses the advantages and economies of having his interest represented in the class action. This tends to defeat the purpose of the class action device to vindicate the interests of the victims of mass production wrongs. "Generally, unless the anticipated recovery exceeds the sum of the measure of the injury and the cost of litigation, multiplied by the probability of a successful decision, the aggrieved person will not seek to vindicate his rights." Note, *Judicial Prerequisites to Class Actions in Illinois: Policy, Prac-*

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[52] Although we note the similarity of our reasoning with that of the *Eisen* opinion, we express no opinion on whether the fluid class recovery technique itself is inconsistent with the Rules Enabling Act.

tice, and the Need for Legislative Reform, 1976 U. Ill. L.F. 1159, 1167. The letters of those subclass members who objected to the settlement proposal indicate the illusory value of the right to pursue their claims individually:

> I will go along with the majority. I can't afford to spend any money on a personal law suit.
>
> * * * *
>
> Reguardless [*sic*] of the decision of the Court, I will accept it, because I cant [*sic*] whip a giant like General Motors, but you do have the powers of your Judgeship and your Court to set things stright [*sic*] as they should be.
>
> This is not to be accepted as notice of withdrawal of Class or Subclass membership.

These letters also refute GM's argument that we can countenance the dismissal of the Magnuson-Moss claim of a nonconsenting subclass member because he was aware of the settlement's terms at the time he made his election to remain in or opt-out of the subclass. The opportunity to opt-out was not a very realistic one. Furthermore, we fail to see that a subclass member's knowledge that he may be treated unfairly excuses committing the injustice.

Even if the subclass member does pursue his state remedies, he is still prejudiced by the dismissal of his Magnuson-Moss claim. "From a consumer protection point of view, the Warranty Act is clearly preferable to the Uniform Commercial Code, which is difficult to apply to consumer sales transactions and is full of pitfalls for consumers seeking recovery for defective products." Smith, *The Magnuson-Moss Warranty Act: Turning the Tables on Caveat Emptor*, 13 Cal. W.L. Rev. 391, 429 (1977). In addition to providing a more certain path to recovery, the Magnuson-Moss Act provides the consumer with a more adequate remedy. It provides that the successful plaintiff may also recover the costs of litigation (subject to the court's discretion not to award attorneys' fees). 15 U.S.C. § 2310(d)(2). Thus, the dismissal of the subclass member's Magnuson-Moss claim, leaving him to pursue his state remedies individually,

reduces both the probability that the consumer will pursue those remedies and, if he does, the probability that his remedy will be adequate.[53]

GM maintains that we should approve the settlement because it has the "overwhelming" support of the settlement subclass members. GM argues that because only fifteen subclass members or .03% of the subclass opted out of the action or objected to the settlement after notification of its terms, 99.97% of the subclass members support the settlement. Although the support of class members is one factor which should be considered in determining the fairness of a settlement, *see* Manual for Complex Litigation § 1.46 at 56, we are not as willing as GM to infer support from silence.

> When a court evaluates the settlement of a class action brought on behalf of individual shareholders or consumers, it should be reluctant to rely heavily on the lack of opposition by alleged class members. Such parties typically do not have the time, money or knowledge to safeguard their interests by presenting evidence or advancing arguments objecting to the settlement.

Factors Considered in Determining the Fairness of a Settlement, 68 Nw. U.L. Rev. 1146, 1153 (1974). *Accord, Developments in the Law—Class Actions*, 89 Harv. L. Rev. 1318, 1567-68 (1976); *cf.* Simon, *Class Actions—Useful Tool or Engine of Destruction*, 55 F.R.D. 375, 377-79 (1973) (discussing the tendency of class members not

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[53] The dismissal of the subclass members' claims pursuant to the unusual form of settlement here would also tend to undermine the purpose of the Magnuson-Moss Act. As to nonconsenting subclass members, the purpose of the Act to provide a more certain remedy than is provided under state law would be totally defeated. We think that the settlement provides a unique example of how class action settlements may tend to defeat, rather than promote, the policies and purposes of the laws sought to be enforced. *See generally* DuVal, *The Class Action as an Antitrust Enforcement Device: The Chicago Experience (Part II)*, 1976 A.B. Foundation Research J. 1273.

to respond to court communications).[54] Acquiescence to a bad deal is something quite different than affirmative support.[55] In any event, even if a majority of the subclass did favor the settlement, we do not believe that the preferences of the majority can justify the substantial injustice to the individual rights of the minority that the form of settlement proposed here would work.

VI. Directions on Remand

In response to a question from the bench at oral argument, GM represented to the court that even if the *settlement* of the federal class action is not effectuated, GM may still seek to extend its *offer* to individual members of the class.[56] Local Rule 22 appears to require

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[54] Because the bulk of the class consists of individual consumers, this case is unlike *State of West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710, 743 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971), in which the court stated that support by class members was entitled to "great weight." Many of the class members in *Pfizer* were large public or private institutions with large stakes in the litigation. Thus, they could be expected to come forward to protect their interests. The *Pfizer* settlement, however, may not have been in the best interest of those individual consumers represented in the action. *See In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions*, 410 F. Supp. 706 (D. Minn. 1975) (approving subsequent settlement offering consumers substantially higher payments). *See generally* Wolfram, *The Antibiotics Class Actions*, 1976 A.B. Foundation Research J. 251.

[55] GM's brief indicates that only 26 individuals wrote to the trial court to express their approval of the settlement.

[56] Indeed, the agreement between GM and the Attorneys General may obligate GM to extend the offer. Paragraph 11 of the agreement provides:

> while failure by [the district] court to allow General Motors to make such offer to such offerees shall relieve General Motors of the obligation under this Agreement to make such offer, failure by such court to approve settlement of such action . . . shall not relieve General Motors of such obligation if the court has nevertheless allowed General Motors to make such offer in exchange for a Release. . . .

the trial court's approval of any such communication.[57] The question thus presented is whether the trial court can approve the communication of the offer, despite our reversal of the court's order approving the settlement.

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[57] Local Rule 22 of the Northern District of Illinois, captioned "For Prevention of Potential Abuse of Class Actions," provides:

> In every potential and actual class action under Rule 23, FR Civ P, all parties thereto and their counsel are hereby forbidden, directly or indirectly, orally or in writing, to communicate concerning such action with any potential or actual class member not a formal party to the action without the consent of and approval of the communication by order of the Court. Any such proposed communication shall be presented to the Court in writing with a designation of or description of all addressees and with a motion and proposed order for prior approval by the Court of the proposed communication and proposed addressees. The communications forbidden by this rule, include, but are not limited to, (a) solicitation directly or indirectly of legal representation of potential and actual class members who are not formal parties to the class action; (b) solicitation of fees and expenses and agreements to pay fees and expenses, from potential and actual class members who are not formal parties to the class action; (c) solicitation by formal parties to the class action of requests by class members to opt out in class actions under subparagraph (b)(3) of Rule 23, FR Civ P; and (d) communications from counsel or a party which may tend to misrepresent the status, purposes and effects of the action, and of actual or potential Court orders therein, which may create impressions tending, without cause, to reflect adversely on any party, any counsel, the Court, or the administration of justice. The obligations and prohibitions of this rule are not exclusive. All other ethical, legal and equitable obligations are unaffected by this rule.
>
> This rule does not forbid (1) communications between an attorney and his client or a prospective client, who has on the initiative of the client or prospective client consulted with, employed or proposed to employ the attorney, or (2) communications occurring in the regular course of business or in the performance of the duties of a public office or agency (such as the Attorney General) which do not have the effect of soliciting representation by counsel, or misrepresenting the status, purposes or effect of the action and orders therein.

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We think that the trial court can. GM's offer to settle, if accepted by individual class members, would not amount to a settlement of the class action itself. Individual class members would be free to reject it and continue to have their interests represented in the federal class action. Thus, the communication falls outside the language and the purpose of Rule 23(e).[58] *See*

[57] *continued*
The rule was adopted in accordance with the Manual's recommendation for preventing unauthorized communications with class members, *see* Manual for Complex Litigation § 1.41, and follows almost verbatim the local rule contained in the Manual's appendix. *See id.*, Appendix § 1.41. (Suggested Rule No. 7). *See also* Dole, *The Settlement of Class Actions for Damages*, 71 Colum. L. Rev. 971, 993-97 (1971).

Questions concerning the district court's authority to promulgate the rule pursuant to Fed. R. Civ. P. 83 have not been raised by the parties and we do not consider them here. *See generally* Manual for Complex Litigation § 1.41 (4th ed. 1977 & Cum. Supp. 1978). In any event, Rule 23(d), *see Weight Watchers, Inc. v. Weight Watchers International, Inc.*, 455 F.2d 770, 775 (2d Cir. 1972), and the court's inherent power to control the conduct of the litigation before it, *see Vernon J. Rockler & Co. v. Minneapolis Shareholders Co.*, 425 F. Supp. 145, 150 (D. Minn. 1977), provide additional sources for the district court's power to control this particular communication with class members.

[58] This case does not present the question, and we need not decide, whether Rule 23(e) would be applicable if so many class members accepted GM's offer that the class action could no longer be prosecuted as a class action. *Compare American Finance System Inc. v. Harlow*, 65 F.R.D. 572, 576-77 (D. Md. 1974), *with Vernon J. Rockler & Co. v. Minneapolis Shareholders Co.*, 425 F. Supp. 145, 150 (D. Minn. 1977).

Predicting the number of class members who might accept GM's offer at this time is admittedly speculative, but even if enough named plaintiffs accept the offer to reduce the number of named plaintiffs below the jurisdictional prerequisite, *see* 15 U.S.C. § 2310(d)(3) & note 2 *supra*, the trial court's jurisdiction to decide the class action would remain unaffected. The general rule is that the jurisdiction of the federal court is determined at the time of the filing of the complaint. *See Mullen v. Torrance*, 22 U.S. (9 Wheat.) 537, 539 (1824) (diversity not defeated when party subsequently becomes a citizen of the same state as his opponent. "It is quite clear, that jurisdiction of the court depends upon the

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Weight Watchers, Inc. v. Weight Watchers International, Inc., 455 F.2d 770 (2d Cir. 1972)[59]; *Rodgers v. United*

[58] *continued*
state of things at the time of the action brought, and that after vesting, it cannot be ousted by subsequent events."); *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283 (1938) (court is not ousted of jurisdiction if plaintiff reduces claim to less than jurisdictional amount subsequent to removal from state court); *cf. Rosado v. Wyman*, 397 U.S. 397, 402-05 (1970) (federal court may decide pendent claim even after claim which provided the basis for jurisdiction becomes moot). We see no reason why the general rule should be changed under the Magnuson-Moss Act, particularly when Congress intended that section 110(d) be "construed reasonably to authorize the maintenance of a class action." H.R. Rep. No. 93-1107, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 7702, 7724. The class action can in no sense be regarded as "trivial or insignificant" merely because some of the named plaintiffs have accepted the benefits which the class action has brought forth. Thus, a reduction in the number of named plaintiffs would not preclude the trial court from proceeding to the merits of the class' Magnuson-Moss claims.

Similarly, even if nearly all the offerees accepted GM's settlement offer—a rather unlikely possibility since the offerees number approximately 70,000—those who rejected the offer would not be denied the benefit of class adjudication of their claims in federal court. Their claims could be adjudicated along with those of the 66,000 post-April 10, 1977, class members to whom GM will not extend the offer. Therefore, the class will not be decertified for lack of the numerosity required by Fed. R. Civ. P. 23(a)(1). *See Rodgers v. United States Steel Corp.*, 541 F.2d 365, 370 & n.11 (3d Cir. 1976).

[59] The court in *Weight Watchers* expressly reserved the precise question that we decide here. *See* 455 F.2d 773 n.1. In *Weight Watchers* the appellant sought review of an order of the trial court permitting communication between the defendant and individual putative class members. Unlike the present case, the pending action had not yet been certified to proceed as a class action. Although the Second Circuit dismissed the appeal from the order for want of appellate jurisdiction, *accord, Rodgers v. United States Steel Corp.*, 541 F.2d 365 (3d Cir. 1976), its reasoning is plainly applicable to the present case: "[W]e are unable to perceive any legal theory that would endow a plaintiff . . . with a right to prevent negotiation of settlements between the defendant and other potential members of the class who are of a mind to do this; it is only the settlement of the class action itself without court approval that F.R.Civ.P. 23(e) prohibits." 455 F.2d at 773.

States Steel Corp., 70 F.R.D. 639 (W.D. Pa.), *appeal dismissed*, 541 F.2d 1365 (3d Cir. 1976); *Dickerson v. United States Steel Corp.*, 11 Empl. Prac. Dec. ¶10,848 (E.D. Pa. 1976); *Vernon J. Rockler & Co. v. Minneapolis Shareholders Co.*, 425 F. Supp. 145 (D. Minn. 1977); 7A C. Wright & A. Miller, Federal Practice and Procedure § 1797 at 238-39 (1972). *But see In re International House of Pancakes Franchise Litigation*, 1972 Trade Cas. ¶ 73,864 (W.D. Mo. 1972); *Developments in the Law—Class Actions*, 89 Harv. L. Rev. 1318, 1548 n.66 (1976). Rule 23(e) requires judicial approval of class action settlements to guard against possible ineffective representation of absentees' interests by the representative parties. This danger does not inhere in offers to settle with individual class members, which the class members are free to accept or reject. Accordingly, a proposed offer to settle with individual class members requires a lesser degree of judicial scrutiny than a proposed settlement of a class action.

The Manual for Complex Litigation provides no standards for judicial approval of communications with individual class members, but we think that the degree of judicial review should be concomitant with the potential for abuse that such communications create. The dangers that the offer to settle individual claims would create are the possible misleading of class members about the strength and extent of their claims and the alternatives for obtaning satisfaction of those claims. Thus, an offer to settle should contain sufficient information to enable a class member to determine (1) whether to accept the offer to settle, (2) the effects of settling, and (3) the available avenues for pursuing his claim if he does not settle. In contrast to judicial examination of a proposed class action settlement which entails consideration of the fairness of the settlement itself, judicial examination of the offer to settle individual claims largely entails only consideration of the

accuracy and completeness of the disclosure.[60] *See, e.g. Vernon J. Rockler & Co. v. Minneapolis Shareholders Co.*, 425 F. Supp. 145 (D. Minn. 1977) (tender offer which met with preliminary approval of SEC contained sufficient information to allow shareholders-potential class members to make an informed and intelligent decision); *American Finance System Inc. v. Harlow*, 65 F.R.D. 572, 576 (D. Md. 1974) (permitting the defendant to send only "a neutrally worded notice of settlement containing no more than the terms of the proposed compromise, the position of both parties and a copy" of the court's order).[61] Whether the offer to settle should

[60] This is not to say that the amount of the proposed consideration for the settlement is entirely irrelevant. An offer to settle which offers only nominal consideration in return may amount to little more than a request that the class members opt-out of the class. *See* Manual for Complex Litigation § 1.41 at 27 (condemning unauthorized solicitations to opt-out). Solicitations to opt-out tend to reduce the effectiveness of (b)(3) class actions for no legitimate reason. Offers to settle, however, both provide redress to individual class members and reduce the burden on the courts of trying massive class suits. Determining the difference between the two kinds of communications necessarily requires some judicial examination of the amount of consideration offered by the defendant. Moreover, the amount offered may be so unrealistically low that the consideration itself tends to mislead class members about the strength and extent of their claims. Thus the trial court should examine the amount tendered in settlement before approving the offer to settle. Yet, because each class member may judge for himself whether the amount offered is acceptable, the court need not determine that the amount is "fair, reasonable and adequate." The court need only find that the proposed exchange provides each individual class member with a *meaningful* opportunity to obtain satisfaction of his claim. *See Rodgers v. United States Steel Corp.*, 70 F.R.D. 639, 644 (W.D. Pa.), *appeal dismissed*, 541 F.2d 365 (3d Cir. 1976).

[61] *See also Chrapliwy v. Uniroyal, Inc.*, 71 F.R.D. 461, 464 (N.D. Ind. 1976) ("although the class action itself may not be voluntarily dismissed without Court approval and scrutiny, an individual claim in a 23(b)(3) action may be settled and dismissed at the class member's own initiative. . . . Because the ability to settle an individual class member's claim could be misused, the Court must be careful to exercise control over

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contain a statement by the plaintiff-objectors of their opinion of the adequacy of the settlement package in order to make the communication a full and complete disclosure is a matter left to the trial court's discretion. We do believe, however, that the trial court should insist that the notice state that the court's permission to communicate the offer does not indicate any opinion or finding by the trial court that the settlement package is fair or adequate consideration for the release of a subclass member's claim. *See American Finance System Inc. v. Harlow*, 65 F.R.D. at 576 n.5.

We do not intend to recommend individual settlements as preferable to a fair settlement of the action for all class members. Given the present posture of this litigation, however, we recommend that the district court consider the advisability of permitting the communication if GM decides to extend its offer to individual members of the class. This procedure would provide those class members who wish to settle the benefit of the settlement package already negotiated, minimize further litigation and discovery on issues collateral to the merits of the Magnuson-Moss claim,[62] and permit those who desire to prosecute their claims to do so. Our discussion here is not intended to resolve all questions

[61] *continued*
the communication of all parties to the suit so that undue influence is prevented"); Dole, *The Settlement of Class Actions for Damages*, 71 Colum. L. Rev. 971, 995-97 (1971); *Developments in the Law—Class Actions*, 89 Harv. L. Rev. 1318, 1549-50, 1601-04 (1976).

[62] Specifically, because a class action defendant may communicate an offer to settle individual claims without the agreement or consent of the named plaintiffs or their counsel, the court need not permit discovery into the conduct of the settlement negotiations before approving the communication of the offer.

raised by GM's offer; these matters are best left to the district court for determination in the first instance.[63]

VII. Conclusion

Our reversal of the district court's approval of the proposed settlement is a decision that we reach with considerable reluctance. We do not seek to discourage a full settlement of this litigation. More than a year has passed since the Illinois Attorney General presented the settlement agreement to the district court for its consideration. Most likely little has been done since then, aside from some additional discovery, to advance toward a trial on the merits. In the meantime, members of the settlement subclass must be wondering whatever became of the $200 and the mechanical insurance policy each had been promised. Our reluctance to unscramble on review what has been accomplished in the trial court, however, must yield when what has been done not only creates a substantial doubt about whether the interests of the class were adequately represented during the settlement negotiations, but also unjustifiably prejudices the rights of individual members of the class. We believe that approval of what has been done here would establish a precedent inconsistent with the proper functioning of the class action device.

We do not question in the least the good faith of the group of state Attorneys General who negotiated the settlement. We are well aware of the increasingly important role that state Attorneys General have taken

[63] In particular, we leave to the district court the difficult question of the entitlement of the class counsel to attorneys' fees for their part in encouraging GM to extend the offer. If the district court decides attorneys' fees are appropriate, it must then grapple with the even more difficult questions of the allocation of fees among the attorneys and the allocation of the burden of the fees between GM and the class or among class members themselves. *See generally* Dole, *The Settlement of Class Actions for Damages*, 71 Colum. L. Rev. 971, 997-1000 (1971); *Developments in the Law—Class Actions*, 89 Harv. L. Rev. 1318, 1547 n.59 (1976).

in protecting consumers' rights.[64] We are also acutely aware of the difficulties which confront litigants attempting to settle consumer class actions based on the Magnuson-Moss Act. The Act by adopting in substantial part, but not preempting state law remedies provides a legal environment conducive to competing state and federal court actions. The myriad lawsuits make settlement desirable, but simultaneously make achieving an acceptable settlement extraordinarily difficult for all concerned. We hold merely that the method of reaching a settlement that GM and the Attorneys General chose warranted greater scrutiny than the trial court permitted and that the form of effecting the settlement permitted by the trial court was unauthorized. Accordingly, the order of the district court is

REVERSED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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[64] *See, e.g.*, Mooney, *The Attorney General as Counsel for the Consumer: The Oregon Experience*, 54 Ore. L. Rev. 117 (1975); Tongren & Samuels, *The Development of Consumer Protection Activities in the Ohio Attorney General's Office*, 37 Ohio St. L.J. 581 (1976); Note, *The Role of the Michigan Attorney General in Consumer and Environmental Protection*, 72 Mich. L. Rev. 1030 (1974); Note, *Consumer Protection by the State Attorneys General: A Time for Renewal*, 49 Notre Dame Law. 410 (1973). *See also* 15 U.S.C. §§ 15a-15h.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

* * (Caption — MDL Docket No. 308) * *

ORDER DATED 7/17/78

Enter Findings of Fact and Conclusions of Law Regarding Subclass Settlement.—DRAFT

Pursuant to Order Approving Subclass Settlement, the court orders that:

1. The settlement proposed by defendant of the subclass claims is determined to be fair and reasonable and is approved by the court.

2. Defendant General Motors shall, at its expense, send an approved notice of settlement, together with appropriate claim form and release, to all subclass members who have not filed a timely request for exclusion from the subclass, by first class mail. All parties are given fifteen days to comment in writing upon the proposed notice of settlement submitted by General Motors.

3. After mailing of the settlement notice has been completed, defendant General Motors shall file with the court an appropriate affidavit of mailing. Thereafter, defendant shall report to the court the names of those subclass members who have accepted the settlement.

4. The action on behalf of subclass members who accept and receive the settlement shall be and is hereby dismissed as to defendant General Motors with prejudice.

5. The action on behalf of subclass members who do not accept the settlement shall be and is hereby dismissed as to defendant General Motors. Dismissal as to those persons shall be without prejudice solely to their rights to pursue such other remedies as may be otherwise available to them.

6. The court retains jurisdiction over the subclass to supervise implementation of the settlement, and retains jurisdiction as to the balance of the full class for all purposes for which the class was initially certified.—DRAFT
Cause set for pretrial conference on August 4, 1978 at 9:15 a.m.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

* * (Caption — MDL Docket No. 308) * *

FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING SUBCLASS SETTLEMENT

This class action litigation is brought on behalf of purchasers of 1977 Oldsmobile cars who received such cars equipped, without their knowledge or consent, with V-8 engines produced by defendant's Chevrolet Motor Division. The class has been certified as to the issue of liability only under the Magnuson-Moss Warranty Act, 15 U.S.C.A. §§2301-12 (1977 Supp.). Subsequently, the court certified a subclass consisting of class members who entered into written purchase orders for their Oldsmobiles on or before April 10, 1977.

The defendant, General Motors Corporation (GM), on December 19, 1977, tendered a proposed settlement to resolve the claims of the subclass members. After allowing the class representatives time to conduct discovery regarding the fairness of the proposed settlement, and after giving notice to all subclass members, the court conducted a hearing on objections to the proposed settlement which commenced on May 1, 1978 and concluded on May 25, 1978.

On the basis of its full consideration of the record before it, including the post-hearing briefs submitted by the parties, the court enters the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

Terms of Proposed Settlement

1. The proposed settlement provides that, upon execution of an appropriate release of claims, GM will pay to each of the 66,872 members of the subclass the cash sum of $200. The total cash sum to be paid to the subclass, if all members accept the settlement, is $13,374,400. (Settlement Agreement, ¶6, filed 12/19/77; "Report on Exclusions from Class and Subclass", filed 5/23/78 (Tr. 1483))

2. Also as part of the settlement, GM will extend to each subclass member who owns an eligible vehicle a special mechanical performance certificate, issued by GM's subsidiary, Motors Insurance Corporation (MIC), insuring components of the car's power train (engine, transmission and drive axle) against mechanical breakdown or failure for a period of 36,000 miles or 36 months from the date of original delivery, whichever occurs first. (Settlement Agreement, ¶6) The specific coverage and terms of the proposed insurance are matters of record and are not in dispute. (DX 49; PX 195)[1] The certificate will be noncancellable and transferable, meaning that it can be assigned to a subsequent purchaser of the vehicle. GM has represented that otherwise eligible losses incurred prior to the issuance date of an individual's certificate will be reimbursed upon submission of adequate documentation of the expense incurred. (Tr. 1483-84)

3. The settlement will give each subclass member the option either to accept the cash payment and insurance certificate in exchange for a release of all his claims, or to reject the settlement and pursue such other remedies as he may feel are available. Thus, subclass members who desire to pursue, under state law theories, a larger award than provided for by this settlement, will not be precluded from doing so.

Support for the Settlement

4. One factor considered by the courts in evaluating the fairness of a proposed class action settlement is the degree of support for, as well as opposition to, the settlement. Of the twelve consolidated cases before the court, the named plaintiffs in seven cases actively support the settlement, while plaintiffs in three cases objected and plaintiffs in two cases remained silent. (Tr. 18-20, 1412;

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[1] All transcript citations are to the record of the fairness hearing unless otherwise indicated. Objectors' exhibits are designated "PX" and defendant's exhibits are designated "DX". Page references to "M...." are to the MDL production numbers appearing on multi-page exhibits.

"Notice of Intention to Appear at May 1, 1978, Hearing and Summary of Objections to Proposed Settlement", filed 4/17/78)

5. The response of the subclass members indicates extensive support for the settlement. Only eleven of the 66,872 subclass members submitted written objections pursuant to the class notice. ("Preliminary Report by Defendant GM Regarding Responses to Class Notices", filed 5/1/78) Of these, three appeared to testify. (Shaffer, Tr. 229; Jasko, Tr. 202; Urfer, Tr. 90) Four other subclass members also appeared at the hearing to express objections to the settlement. (Gordon, Tr. 149; Seltzer, Tr. 170; Perko, Tr. 299; Schulman, Tr. 322)

6. In addition to the support of the majority of class representatives and nearly all subclass members, the settlement offer is supported by the attorneys general of forty-six states. Only the attorneys general of New York, Iowa, Kentucky and Louisiana have not accepted the settlement. (Tr. 1413; Transcript of Proceedings, 12/19/77, pp. 3-9, 23-26) Of these, the Attorney General of New York settled with GM on the basis of the May, 1977 offer. (DX 36) If the settlement is approved, GM has agreed to extend the offer to subclass members in all fifty states. (Block Ex. 1)

Adequacy of the Proposed Settlement

7. Without prejudging in any way the issues joined in the lawsuit, the court was concerned during the fairness hearing principally in assessing the comparability of the Chevrolet-produced engines with the Oldsmobile-produced engines involved in these proceedings.

8. Three Chevrolet-produced V-8 engines were used in 1977 Oldsmobiles. Two had a displacement of 350 cubic inches: the LM1 engine equipped with a four-barrel carburetor and the L65 engine equipped with a two-barrel carburetor. The third engine, designated LG3, was a 305 cubic inch displacement engine. (PX 76; DX 9, 11, 37, 38)

9. In the 1977 model year, Oldsmobile produced V-8 engines with 260, 350, and 400 cubic inch displacements. (PX 76; DX 38) Thus, the LG3 305 engine is not comparable in displacement to any engine produced by Oldsmobile. (Tr. 1149) In the 1977 model year, Oldsmobile equipped approximately 20,000 cars with the LG3 305 as an optional engine. (DX 11) No objection to the settlement was filed by any purchaser of an Oldsmobile equipped with the LG3 305 engine.

10. In the absence of any objection relating to the LG3 305 engine and in the absence of any Oldsmobile-produced counterpart, the settlement appears adequate for those subclass members who selected that engine for their cars. The objecting class representatives adduced no evidence from which it could be concluded that the settlement is inadequate insofar as it relates to those purchasers.

11. Moreover, the engineering evidence presented by GM showed that the LG3 305 engine passed the same corporate durability test as the other GM engines involved in this litigation. (Tr. 1149-51) GM's tests also indicate that the performance (or acceleration) and fuel economy of that engine are satisfactory, falling between those of the 260 Oldsmobile-produced engine and the 350 engines produced by Oldsmobile and by Chevrolet. (Tr. 1151-52) On this record, therefore, it can be concluded that the settlement is fair and adequate with respect to those subclass members who received the Chevrolet-produced LG3 engine.

12. Most of the evidence of engineering comparability presented during the hearing concerned the 350 engines, especially the LM1 Chevrolet-produced engine and the L34 Oldsmobile-produced engine. To a considerable extent, the facts are undisputed, although the inferences to be drawn from those facts are contested. Mindful that it has conducted a fairness hearing and not a trial, the court draws no final conclusions on this subject, but rather assesses the record to determine whether the settlement appears adequate in light of the parties' competing positions regarding the comparability of the two engines.

13. The principal engineering expert to testify at the hearing on behalf of General Motors was a GM employee, Paul Johnson, an automotive engine expert with considerable experience in designing, developing, and testing engines, including the Chevrolet small-block V-8 engine from which the LM1 350 engine is derived. (Tr. 964-73) He testified that the L34 and LM1 engines are the same in basic concept (Tr. 979) and that both were rated at 170 horsepower as used in 1977 Delta 88's. (DX 38) Johnson explained that automotive engineers evaluate and compare automobile engines on the basis of three criteria: durability, performance, and fuel economy. (Tr. 981)

14. Through two automobile mechanics, the objectors identified several dimensional and other physical differences between the LM1 and L34 engines. Johnson, GM's expert, testified that the dimensional and other physical differences were immaterial to the comparative durability and performance of the two engines. Certain physical differences, he testified, reflected equally acceptable engineering solutions to the same engine design challenges. (Tr. 1077-1116, 1137-42)

Durability

15. According to the evidence, each type of engine is subjected to a corporate 200-hour wide-open throttle engine dynamometer test, a strenuous pass-fail test designed to put more wear and strain on the engine than will be imposed by a normal driver under normal driving conditions. (Tr. 985-88; DX 13)

16. Both the L34 and LM1 engines passed GM's 200-hour durability test. Johnson testified that these results indicate that the LM1 and L34 engines are comparable in durability, that the durability of either engine will be satisfactory to a person operating a car equipped with either engine, and that the engines will probably outlast the vehicles in which they are installed. (Tr. 988-92, 997; DX 14) The evidence also indicates that both types of engine passed an over-the-road 50,000-mile durability test as part of the Environmental Protection Agency's (EPA) certification procedures. (Tr. 995-96)

17. The objectors introduced Oldsmobile's reported warranty repair data on the LM1 and L34 engines as experienced in 1977 Delta 88 and Omega cars. These data indicate that between March, 1977, when this litigation was filed with its attendant publicity, and October, 1977, the frequency of warranty claims experienced by Oldsmobile was somewhat higher with the LM1 engine than with the L34 engine. (PX 141) Oldsmobile's warranty cost per engine was correspondingly higher on the LM1 engine than on the L34 engine. (PX 142)

18. No evidence was submitted indicating that the disparity in warranty experience between the two engines reflected any difference in the durability or quality of the two engines. According to Johnson's testimony, warranty claims data indicate the correction of problems occurring in mass production which are made at no cost to the buyers. Such problems normally are identified early in the life of the particular car and are not apropos to the question of durability.

Performance

19. Engine performance is measured as acceleration potential or maximum performance capability. (Tr. 1002-03) GM's test data indicate that the LM1 engine offers slightly better performance than the L34 engine, although the difference might not be discernible to an average driver. (DX 15; Tr. 1002-03, 1330) The objectors' principal mechanic witness agreed that the LM1 engine offered somewhat better performance. (Tr. 789-91)

20. The slight edge given to the Chevrolet-produced LM1 engine in the area of performance or acceleration takes on added significance in view of the marketing evidence offered by the objectors which demonstrated that an optional 350 cubic inch engine was more likely to be selected by purchasers who desired higher performance. (PX 127, p. M5840; PX 143; Tr. 124) To the extent that subclass members chose an optional 350 engine over the base or standard engine offered in their 1977 Oldsmobiles to obtain higher performance, the record indicates that

the LM1 engine offered equal if not slightly greater performance than the Oldsmobile L34 350 engine. (Tr. 1134-35)

Fuel Economy

21. The 1977 official EPA miles-per-gallon estimates were 18 mpg and 17 mpg on a combined city/highway basis for the L34 and LM1, respectively. (PX 169, 170) On the basis of an assumed price of 70¢ per gallon, the objectors urged that, over a driving cycle of 105,000 miles, the 1977 EPA-estimated differential would amount to a cost differential of approximately $230. (PX 171)

22. GM's expert testified that EPA mileage estimates are not based on over-the-road tests, but rather are calculated from measurements of emissions during in-place dynamometer tests. (Tr. 1009) His opinion was that differences of one mile-per-gallon in EPA estimates are not a reliable indicator of the relative fuel economy of two engines under actual driving conditions. (Tr. 1005; 1047-48)

23. This opinion is supported by other evidence introduced by GM. The EPA itself in a proposed rule has commented that "the relative ranking in the Guide for a 20 mpg car as compared to a 21 mpg car is not highly significant." *Fed.Reg.*, Vol. 43, No. 33 (Feb. 16, 1978) (p. 6818) (DX 22) In a separate study, two governmental engineers concluded:

> "For a 1 mpg difference in the EPA values between two vehicles, the probability of rank reversal in use is about 40% for the whole range of cars for one model year. In order to achieve a probability of correct ranking in use of 90% for any two vehicles from the whole population, the difference between the two vehicles must be about 5 mpg based on the EPA numbers."
> *A Comparison of Fuel Economy Results from EPA Tests and Actual In-Use Experience 1973-1977 Model Year Cars,* February, 1978, page 23 (DX 23)

24. GM introduced the results of three over-the-road fuel economy tests involving comparisons of the L34 and LM1 engines. In one test, conducted on September 22,

1976, Oldsmobile tested a Delta 88 equipped with an L34 engine against a Chevrolet Caprice, of comparable weight, equipped with an LM1 engine. Based on the test results, the overall actual fuel economy was computed on a weighted basis of 16.30 mpg and 16.28 mpg for the L34 and LM1 engines, respectively. (DX 17, 25, 26) Using the objectors' own measurement, this differential would result in a cost differential of only $5.53 between the two engines over a distance of 105,000 miles. (PX 171) However, when the September 22, 1976 data (DX 17) are arithmetically averages, the LM1 surpassed the L34 in fuel economy. (DX 24) In any event, GM's expert testified that the mpg differential was so small that it was beyond the engineer's ability to measure it reliably. (Tr. 1018, 1040, 1048)

25. In another GM over-the-road test, involving a Delta 88 equipped with an LM1 and a Delta 88 equipped with an L34 driven from Lansing, Michigan, to Phoenix, Arizona, the fuel economy of the two engines was comparable, according to Johnson. (Tr. 1022; DX 20) The differential was computed at 0.45 mpg in favor of the L34 engine (Tr. 1053) —again, an amount he testified was too small to measure reliably. (Tr. 1040, 1048) The test reports also indicate that the L34 engine failed to meet prescribed emission levels both before and after the test, thus enhancing its fuel economy. (Tr. 1023-24)

26. As with the other two tests, Johnson testified that the data from the third over-the-road test demonstrated the fuel economy of the two engines to be comparable within the ability of the tests to discriminate. (DX 18; Tr. 1019) Based on the totality of fuel economy data available to him, Johnson's expert engineering conclusion was that the two engines offered comparable fuel economy in 1977 Oldsmobiles. (Tr. 1018, 1027, 1040)

27. Also regarding fuel economy, GM notified its dealers of its planned usage of the LM1 engine in some Oldsmobile models prior to their production and gave its dealers proper 1977 EPA mpg estimates for that engine. (PX 179, 180; DX 37, 43) GM asked its dealers to hand-correct ex-

isting merchandising materials to reflect the new data. (PX 180, p. M4760) It also prepared wall posters for dealer showrooms and revised its new car catalogs to reflect the new EPA figures. (PX 180, p. M4760; PX 76, 78) GM's evidence that an EPA mileage label bearing the proper EPA ratings was affixed to each new car equipped with an LM1 engine was uncontradicted. (Tr. 686; DX 6; PX 40) Hence, steps were taken to supply consumers with proper EPA estimates for the LM1 engine. (Tr. 73; DX 6; PX 40, 179, 180, 76)

28. This aspect of the case is further complicated by the characterization of the EPA mpg numbers as "estimates" even by the EPA. (PX 169, 1970, 40; DX 6) Promotional materials introduced by the parties reflect the caveat to consumers that:

> "EPA mileage ratings are estimates and your mileage may vary according to your own driving habits, the condition of your car, and the type of equipment installed." (DX 46)

Some objecting subclass members testified that they were aware of this caveat at the time of purchase. (*See, e.g.*, Tr. 73-74, 338) Moreover, the objectors conducted an over-the-road comparison from Texas to Illinois between two Delta 88's, one equipped with a high-altitude L34 engine and the other with a low-altitude LM1 engine. (DX 58, 59; Tr. 1555-59) While the comparison made does not appear to be a reliable indication of relative fuel economy, the fuel economy achieved by the LM1 engine in the objectors' own demonstration actually exceeded the combined city/highway EPA estimate for both the LM1 and L34 engines. (Tr. 1546, 848; PX 169, 226, 227)

29. With respect to the L65 350 engine, Johnson testified that it is similar to the LM1 engine and has the same short block. (Tr. 1146) Because the L65 engine develops somewhat less horsepower with a two-barrel carburetor, he concluded that its durability would be at least equal to or greater than that of the LM1 engine. (Tr. 1147) Johnson also testified that the performance or acceleration of the L65 would be less than that of the L34

engine by about the same amount as the LM1's performance exceeds that of the L34. (Tr. 1147) According to Johnson, the fuel economy offered by the L65 engine was comparable to that offered by the LM1 and L34 engines. (Tr. 1148) No significant evidence contradicting these conclusions was offered by the objectors insofar as the L65 engine is concerned.

30. For purposes of evaluating the proposed settlement, the evidence regarding the comparability of the LM1, L65, and L34 engines, even though contested at points, persuades the court that the settlement falls well within the parameters of reasonableness and fairness. However, the objectors have raised other objections to the settlement which the court also has considered in reaching its conclusion. The principal remaining objections are discussed in the balance of these findings.

Transmission Usages

31. The objectors contended at the hearing that Oldsmobile used a different and less expensive transmission with the LM1 engine in Delta 88 coupes and sedans than it used with the L34 engine in those vehicles. The record does not support this contention. Oldsmobile's Director of Material Control testified that, effective March 30, 1976, Oldsmobile had released the THM 200 transmission for use with L34 engines in 1977 Delta 88 coupes and sedans. (DX 10; Tr. 653-55) Other evidence introduced by the objectors indicates that the THM 200 transmission was planned for use with the L34 engine in Delta 88 cars prior to the decision in September, 1976 to use the LM1 engine in some of those cars. (PX 127, pp. M5884, M5914) Oldsmobile production figures verify that all 1977 Delta 88 coupes or sedans were equipped with a THM 200 transmission regardless of whether the L34 or LM1 engine was installed in them. (DX 9; Tr. 657) In fact, both 1977 Delta 88 cars used by the objectors in their road comparison had THM 200 transmissions. (Tr. 238)

Replacement Parts Prices

32. The objectors maintained that a relevant measure of damages would be the net differential in the suggested retail replacement parts prices for the LM1 and the L34. The evidence is conflicting on this point since GM's evidence shows the Chevrolet-produced engine to be slightly more expensive than the Oldsmobile-produced engine if purchased as a replacement part. (DX 57) The objectors claim that the Oldsmobile replacement parts cost over $400 more than the Chevrolet parts. (Tr. 748)

33. The court does not find it necessary to resolve this evidentiary conflict since the objectors' evidence, even if accepted, has little or no probative value. (Tr. 747-53, 868) There is no showing that replacement parts prices reflect quality or other relevant differentials between the two engines as opposed to differences in volume, distribution methods, packaging, and other matters related uniquely to the replacement parts business. To whatever extent relevant, the objectors' evidence suggests that the estimated manufacturing costs of the two engines were closely equivalent (PX 115) and that, insofar as Oldsmobile Division is concerned, it was more costly for it to use the LM1 engine rather than the L34 engine. (Tr. 685, 698)

Conduct of Negotiations

34. The objectors also complain that the settlement was negotiated in a manner inconsistent with the court's pretrial orders. This objection, even if valid, does not bear on the adequacy of the proposed settlement and would not constitute sufficient grounds to withhold an otherwise fair settlement from consideration by the subclass members. However, since the issue is raised, a discussion of it is appropriate.

35. The settlement was negotiated by the Consumer Protection Committee of the National Association of Attorneys General, representatives of which appeared before the court on December 19, 1977 to apprise the court of the settlement. (Transcript of Proceedings, 12/19/77, pp. 3-9,

23-26) The offer to subclass members is part of a larger settlement package negotiated by the attorneys general in their capacities as official law enforcement officers with responsibility for enforcing the consumer protection laws of their respective states. (Settlement Agreement; Transcript of Proceedings, 12/19/77, pp. 23-26; Tr. 432, 438-39) Two of them, the attorneys general of Alabama and Illinois, are also counsel for class representatives in this litigation. The record reflects that the negotiations between GM and the attorneys general were known to at least some private counsel in advance of the settlement. (Tr. 442; Transcript of Proceedings, 12/13/77) When the fact of the negotiations was first raised with the court, no plaintiff claimed that the court's orders were being violated, and the court encouraged the negotiations to continue. (Transcript of Proceedings, 12/13/77, pp. 11-12, 16)

36. Partly because private counsel for the class were not involved directly in the settlement negotiations, the court allowed them full opportunity for discovery into its adequacy and for clarification of its terms. Private plaintiffs' counsel availed themselves of that opportunity and, as noted, six of them have concluded that the settlement is fair and reasonable in light of the ensuing investigation. (Tr. 18-20, 937-41) Full opportunity has been given to the objectors to call to the court's attention any and all complaints regarding the settlement terms. Under the circumstances, the court is assured that no prejudice has resulted to the subclass members by reason of the manner in which the settlement was negotiated.

Post-April 10 Purchasers

37. The objectors also express concern that approval of the proposed settlement will somehow prejudice the interests of class members who are not also members of the subclass. The court does not find this to be the case. The litigation will proceed as to post-April 10 purchasers without any prejudice to such legal rights and interests as they otherwise might possess. As observed in the ruling establishing a subclass and as further evidenced in the hearing

record, there are significant factual distinctions between the subclass members and other class members which justify selection of April 10 as a reasonable line of demarcation between them for settlement and other purposes. (DX 37)

Punitive Damages

38. The parties are in disagreement over whether the Magnuson-Moss Act can be interpreted to authorized punitive damages in cases such as these. The court does not find it necessary to resolve that legal question in the context of its consideration of the settlement's fairness. Both sides introduced substantial evidence that GM's decision to use the LMI engine in Oldsmobiles was made by Oldsmobile management to satisfy unexpectedly high consumer demand for cars equipped with 350 cubic inch engines, after it became clear that such demand was likely to outstrip Oldsmobile's productive capacity for its L34 engine. (PX 127, pp. M5794, M5814, M5835, M5878, M5889-94; PX 117; DX 40; Tr. 616, 669) There is evidence that it is common industrial trade practice for manufacturers, including automobile manufacturers, to use parts and components, including engines and engine parts, supplied by outside concerns. This same practice is and has been common among and between GM's various divisions. (PX 101, DX 44; Tr. 155-56, 600, 617-19, 622-24, 1152-57) There is also evidence that Oldsmobile evaluated the LMI and L34 engines and found them comparable from an engineering standpoint prior to the start of their use in production. (DX 17; PX 115; Tr. 688) It was not disputed that Oldsmobile took affirmative steps promptly after its decision was made and before the start of production to notify dealers of the change in engine availability (PX 179, 180) and specifically to delete references to "Rocket" 350 engines in promotional materials with respect to those models in which the LM1 engine was to be used. (PX 78, 81-84, 120; Tr. 371, 377, 381)

39. Based on the hearing record, the court is persuaded that the interests of the subclass members would not be

well served by withholding the proposed settlement from them against the objectors' contention that a claim for punitive damages eventually might be made out and sustained.

Engine Servicing

40. The recommended tune-up schedules for the LM1 and L34 engines suggest one more tune-up for the LM1 than for the L34 over a 100,000-mile engine life. Johnson testified that the additional tune-up was included in EPA certifications to maintain emissions levels in conjunction with manual transmissions and that the LM1 engine had, in fact, operated fully satisfactorily even when maintained in accordance with the tune-up intervals recommended for the L34. (Tr. 1001-02) This information was not, however, available to purchasers.

41. The evidence indicates that the L34 engine may experience somewhat better oil economy than the LM1, although the degree of difference is not reliably estimated in the record. (Tr. 1062-63) The evidence also indicates, however, that oil economy differences would not affect durability or performance. (Tr. 1062) No evidence was offered indicating that the discounted value of any oil economy difference which might exist involved a significant financial detriment.

Value of Insurance Certificate

42. The parties dispute the retail premium value to consumers of the insurance certificate offered as part of the settlement and the probable cost of the policy to GM. The only direct evidence relating to the retail premium value of the certificate consists of testimony and exhibits offered by a marketing vice president of GM's MIC subsidiary. He testified that, to a person desiring comparable mechanical insurance coverage in the marketplace, a conservative estimate of the retail premium that he would be charged was $200. (Tr. 1658-61, 1674-75; DX 48-56) The objectors dispute this valuation by arguing that most of the subclass members already possess a *non*transferrable certificate of comparable coverage issued by GM unilaterally in April,

1977, after the litigation commenced. (PX 190, 192) Instead of a $13 million aggregate retail value, the objectors place the policy's value at $3 million. (Tr. 710) In evaluating a proposed settlement, the court may appropriately consider the total benefits conferred on the class members by virtue of the litigation, even though some of the benefits were conferred prior to the settlement.

43. In truth, except for the indicia of value furnished by the premium cost of a similar policy, the real value of this feature of the settlement cannot be presently determined. If, in the future, there are relatively few mechanical problems with the Chevrolet-produced engines, the engines will have served the purchasers well and they will not have been damaged. Conversely, should the engines encounter a high rate of mechanical problems, the greater will be the protection and "value" of the insurance. Since GM's premium costs are open-ended and will be adjusted retrospectively after all the policies expire (PX 195; Tr. 1656-57), its costs similarly will be lower if the engines perform well and will increase if and as mechanical problems are encountered with the engines or other covered power train components.

Other Objections

44. Other objections have been made by the objecting plaintiffs and individual subclass members which are not explicitly addressed in these findings. The court has fully considered them, together with the objections discussed above, and regards them individually and collectively as being insufficient to cast serious doubt on the adequacy and fairness of the settlement. To the extent that subclass members may be dissatisfied individually with the settlement offer, they remain free to reject it and pursue such other legal recourse as may be available to them.

CONCLUSIONS OF LAW

1. The court has jurisdiction over the subject matter and personal jurisdiction over the parties.

2. Pursuant to Rule 23, Fed.R.Civ.P., the court determines that the proponents of the proposed settlement have met their burden of persuading the court that the settlement terms are fair, reasonable, and adequate to subclass members, notwithstanding the objections presented to it. Approval will be granted to communicate the settlement offer to subclass members in a form of notice to be approved by the court.

3. On condition that the settlement is implemented, an appropriate order will be entered dismissing the litigation with prejudice on behalf of subclass members who accept the settlement, and dismissing the litigation as to subclass members who reject the settlement without prejudice to their right to pursue such individual state law remedies as may be available to them.

4. The court retains jurisdiction of the subclass litigation to supervise the settlement in accordance with the Settlement Agreement dated December 19, 1977. The court retains jurisdiction over the remaining class litigation for all purposes.

Enter:

/s/ Frank J. McGarr
United States District Judge

Dated: July 17, 1978

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

* * (Caption — MDL Docket No. 308) * *

ORDER APPROVING SUBCLASS SETTLEMENT

Pursuant to Findings of Fact and Conclusions of Law entered this day, the court hereby orders that:

1. The settlement proposed by defendant of the subclass claims is determined to be fair and reasonable and is approved by the court.

2. Defendant General Motors shall, at its expense, send an approved notice of settlement, together with appropriate claim form and release, to all subclass members who have not filed a timely request for exclusion from the subclass, by first class mail. All parties are given fifteen days to comment in writing upon the proposed notice of settlement submitted by General Motors.

3. After mailing of the settlement notice has been completed, defendant General Motors shall file with the court an appropriate affidavit of mailing. Thereafter, defendant shall report to the court the names of those subclass members who have accepted the settlement.

4. The action on behalf of subclass members who accept and receive the settlement shall be and is hereby dismissed as to defendant General Motors with prejudice.

5. The action on behalf of subclass members who do not accept the settlement shall be and is hereby dismissed as to defendant General Motors. Dismissal as to those persons shall be without prejudice solely to their rights to pursue such other remedies as may be otherwise available to them.

6. The court retains jurisdiction over the subclass to supervise implementation of the settlement, and retains jurisdiction as to the balance of the full class for all purposes for which the class was initially certified.

Enter:

/s/ Frank J. McGarr
United States District Judge

Dated: July 17, 1978

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

* * (Caption — MDL Docket No. 308) * *

ORDER DATED 3/14/78

Pursuant to memorandum opinion and order entered this day, defendant's motion to redefine the plaintiff class is denied. For purposes of sending the settlement notice, the court designates a subclass defined as follows:

> All persons in the United States (other than General Motors Corporation, its subsidiaries, affiliates and dealers) who entered into a written purchase contract, dated on or before April 10, 1977, with General Motors or a General Motors franchised dealer, for a 1977 model Oldsmobile and who received such 1977 model Oldsmobile equipped with a V-8 engine produced by the Chevrolet Motor Division of General Motors Corporation.

For all other purposes, the subclass is limited by the same knowledge requirement as is set forth in the original class definition.—DRAFT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

* * (Caption — MDL Docket No. 308) * *

MEMORANDUM OPINION AND ORDER

Defendant General Motors has filed a motion to redefine the plaintiff class which was certified by this court on October 13, 1977, as follows:

> All persons in the United States (other than General Motors Corporation, its subsidiaries and affiliates) who purchased 1977 Oldsmobile automobiles and who received Oldsmobile automobiles which, without their

knowledge or consent, contained V-8 engines manufactured by the Chevrolet Motor Division of General Motors Corporation.

The proposed redefinition of the class which General Motors has set forth in its motion is as follows:

> All persons in the United States (other than General Motors Corporation, its subsidiaries, affiliates and dealers) who entered into a written purchase contract, dated on or before April 10, 1977, with a General Motors franchised dealer, for a 1977 model Oldsmobile equipped with a V-8 engine produced by the Chevrolet Motor Division of General Motors Corporation.

This redefinition on the one hand purports to expand the original class certified by this court by dispensing with the knowledge requirement of the certified class definition. On the other hand, the redefinition purports to limit the class to purchasers who entered into a written contract to purchase their Oldsmobile on or before April 10, 1977.

One of the reasons for General Motors' redefinition of the plaintiff class is to have the class definition coincide with the group of purchasers with whom General Motors intends to settle this litigation.[1] However, General Motors also contends that because of the extensive communication of the origination of the engines to post-April 10, 1977, purchasers, individual factual questions of notice, and awareness predominate over any common question of law or fact to be adjudicated. General Motors asserts that this communication creates a different factual posture for pre-April 11 and post-April 10 purchasers and places them in competing positions with potentially conflicting legal and

[1] A proposed settlement agreement has been reached between General Motors and the Attorneys General of forty-five states, which agreement provides for an offer of settlement to pre-April 11, 1977, purchasers.

factual theories. Finally, General Motors contends that it is particularly inappropriate in this litigation to deviate from the principle that post-complaint purchasers should not be included in a plaintiff class, noting that certain complaints in this litigation were filed in March of 1977. These arguments, GM contends, militate against the treatment of post-April 10 purchasers as members of a plaintiff class.

Though defendant has accentuated the individual factual questions of notice and awareness which arise under this court's original class definition, we find that the question of comparability of the substituted Chevrolet engine to the Oldsmobile engine, which question establishes both liability and damages, is common to each class member and overrides the individual factual questions presented. The individual factual questions will complicate the class action procedure, but they do not make a class action unmanageable. Thus the motion of General Motors to redefine the original class definition is denied.

We do, however, find merit in General Motors' position that the pre-April 11 and post-April 10 purchasers are in factually different positions. Because of General Motors' campaign to notify prospective Oldsmobile purchasers of the substituted engine, in response to various court orders, a post-April 10 purchaser will have a more difficult task in proving lack of notice and awareness than a pre-April 11 purchaser. Logic dictates that those people who purchased their Oldsmobiles prior to the advent of the notification campaign are less likely to have had knowledge of the substituted engine. We do not find these factually different positions to warrant decertification of post-April 10 purchasers as class members. We do find, however, that the factually different positions warrant treatment of pre-April 11 purchasers as a subclass of the original certified class. This subclass of purchasers is still bound by the knowledge requirements set forth in this court's original class certification. However, General Motors intends to offer, subject to court approval, a proposed settlement package to all pre-April 11 purchasers, without regard to the purchaser's knowledge of the engine substitution. For the pur-

pose of sending a notice of the pendency of the class action and a notice of the offer of settlement to pre-April 11 purchasers, the court will adopt General Motors' proposed redefinition of the class, as modified by the court, as the definition of the designated subclass. It is understood, however, that should the settlement not be approved, or for any other reason not reach fruition, the knowledge requirement of the original class definition will continue to bind the members of the subclass.

General Motors has also argued that post-complaint purchasers should not be included in the plaintiff class, especially under the circumstances of this litigation, citing *Muth* v. *Deckert, Price & Rhoads,* 70 F.R.D. 602 (E.D. Pa. 1976). We are not persuaded by that case. Generally, a case crystallizes with the filing of the complaint in accordance with the justiciability requirements of the "case or controversy" phrase in Article III of the Constitution. Thus, the related concepts of standing and ripeness are the impediments to the court's exercise of jurisdiction over the claims of post-complaint purchasers. A purchaser who purchased his Oldsmobile in July of 1977 obviously had no justiciable case or controversy against General Motors in March of 1977. However, there can be no question that that same purchaser's claim was ripe for adjudication at the time the plaintiff class was certified in this case, and that had he then brought suit on his own, he would have had standing to sue. Therefore, in accordance with the discretion allowed the trial court and the responsibility vested in the court for determining the extent of class membership, *see generally Baxter* v. *Savannah Sugar Refining Corp.,* 46 F.R.D. 56 (S.D.Ga. 1969), and in accordance with the order previously entered in this case on December 6, 1977, defendant's motion to decertify post-complaint purchasers is denied.

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2 We note that because of the multidistrict nature of the case, this court has before it a complaint filed by a purchaser of an Oldsmobile with a Chevrolet engine as late as August 2, 1977.

In accordance with the foregoing, defendant's motion to redefine the plaintiff class is denied. The court does, however, designate a subclass which, for purposes of sending the settlement notice, is defined as follows:

> All persons in the United States (other than General Motors Corporation, its subsidiaries, affiliates and dealers) who entered into a written purchase contract, dated on or before April 10, 1977, with General Motors or a General Motors franchised dealer, for a 1977 model Oldsmobile and who received such 1977 model Oldsmobile equipped with a V-8 engine produced by the Chevrolet Motor Division of General Motors Corporation.

For all other purposes, the subclass is limited by the same knowledge requirement as is set forth in the original class definition.

Enter:

/s/ Frank J. McGarr
United States District Judge

Dated: March 14, 1978

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

* * (Caption — MDL Docket No. 308) * *

ORDER DATED 10/13/77

Pursuant to Memorandum Opinion and Order entered this day, the plaintiffs' motion for certification of the plaintiff class is granted. The class is defined as follows:

> All persons in the United States (other than General Motors Corporation, its subsidiaries and affiliates) who purchased 1977 Oldsmobile automobiles and who received Oldsmobile automobiles which, without their knowledge or consent, contained V-8 engines manufactured by the Chevrolet Motor Division of General Motors Corporation.

The court, on its own motion, declines the assumption of jurisdiction over the plaintiffs' pendent state claims and hereby dismisses those claims.—DRAFT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

* * (Caption — MDL Docket No. 308) * *

MEMORANDUM OPINION AND ORDER

This cause comes on to be heard on the motion of the plaintiffs for certification of a class of plaintiffs in those counts of the various complaints claiming relief under the Magnuson-Moss Act, 15 U.S.C. §§2301 *et seq.*, and claiming relief under §2-608 of the Uniform Commercial Code as adopted in the jurisdiction of forty-nine of the fifty states.[1]

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[1] Plaintiffs Phil and Eileen Miller have brought a claim against defendant for violation of the Lanham Act, 15 U.S.C. §1125. All other plaintiffs have attempted to adopt this claim through plaintiffs' joint reply memorandum in support of class certification.

(footnote continued on following page)

The definition of the proposed class is:

> "All persons in the United States (other than General Motors Corporation, its subsidiaries and affiliates) who purchased 1977 Oldsmobile automobiles containing V-8 engines manufactured by the Chevrolet Motor Division of General Motors Corporation."

In support of the motion to certify the class, the plaintiffs contend they have satisfied all the requirements necessary for certification of a class under Rules 23(a) and (b) (3), Fed.R.Civ.P.

Defendants object to certification of a plaintiff class, asserting that the only requirement of Rule 23 which is met by the plaintiffs is that of numerosity.

The court first considers certification of the proposed class as to the Magnuson-Moss Act claims.

There is no dispute, as pointed out, that the numerosity requirement is met. There should also be no dispute as to whether or not there are questions of law or fact common to the class. The actions are brought by, and purportedly on behalf of, people who purchased 1977 Oldsmobile automobiles which were powered by Chevrolet engines. The similarity of the cases is obvious; the identity of the factual and legal questions involved therein is equally obvious. Under the Magnuson-Moss Act, "a consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under this chapter, or under a written warranty, implied warranty, or service contract, may bring suit for damages and other legal and equitable relief. . ." 15 U.S.C. §2310(d)(1). The question before this court in each action is whether or not defendant General Motors breached a written or implied warranty in selling the named plaintiffs an Oldsmobile with a Chevrolet engine. This same issue would be presented in

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The court need not address the propriety of such an attempt to amend a complaint. By separate order entered this day, the defendant's motion to dismiss the Lanham Act claim in case number 77 C 1436 has been granted. This order is equally applicable to the other plaintiffs' attempted adoption of this claim.

any case brought under this statute by a member of the purported class. Thus we find the requirement of Rule 23(a)(2) to be satisfied. For the same reasons supporting satisfaction of the (a)(2) requirement, we find the named plaintiffs' claims to be typical of the claims of the proposed class, thereby satisfying the (a)(3) requirement. Further, we find that the representative parties will fairly and adequately protect the interests of the class.[2]

For certification of a class action under Rule 23(b)(3), this court must also find—

> "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."
> Rule 23(b)(3), Fed.R.Civ.P.

Matters which are to be considered pertinent to the above findings are:

> "(A) the interest of the class in individually controlling the prosecution or defense of separate actions;

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2 Defendant GM has objected to the representation of the class by the State of Illinois, claiming that the State is not a member of the class. This objection is based on GM's motion to strike or dismiss Count I of the First Amended Complaint in case number 77 C 927. This motion has this day been denied under separate order.

GM has also objected to the representation of the plaintiff class by Phil and Eileen Miller, plaintiffs in case number 77 C 1436, because their complaint merely echoes that of the State of Illinois (77 C 927), and that of Betty J. Oswald (77 C 1006). The Millers' complaint did contain an additional count brought under the Lanham Act, 15 U.S.C. §1125(a). GM filed a motion to dismiss that count, and that motion has been granted under a separate order entered this day. Despite the granting of that motion and the fact that the Millers' complaint is now essentially the same as that in 77 C 927 and 77 C 1006, we find no reason why the Millers, who are purchasers of a 1977 Oldsmobile with a Chevrolet engine and who have filed an action on behalf of themselves and all others similarly situated, cannot adequately represent the proposed class.

> (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action."
> Rule 23(b)(3), Fed.R.Civ.P.

Because of the nature of the claims against GM and the absence of factors such as pain and suffering, there would appear to be no overwhelming interest individual class members might have in controlling the prosecution of separate actions. On the contrary, the potential for a somewhat limited recovery and the costs attendant to bringing an individual action would appear to militate in favor of a class action for members of the proposed class.

Defendant points out that there are numerous suits already pending in various jurisdictions throughout the country, wherein the same factual circumstances are being litigated pursuant to state statutes and common law. The defendant, therefore, takes the position that the pendency of these suits should foreclose certification of a class in this case.

The particular claim which we are presently addressing for class certification purposes is a federal claim which is not contained in the other state court proceedings. The court recognizes that each member of the proposed class is entitled to only one recovery of his damages and that recovery may be obtained through this proceeding or a state proceeding. The court is confident that all jurisdictions concerned are adequately armed with the necessary powers and procedures to protect the defendant from a double recovery by members of the proposed class. Having satisfied ourselves on this score, we do not feel the pendency of state proceedings should foreclose the certification of a class in this federal claim.

We find no facts or arguments before us which would tend to show the undesirability of concentrating the litigation of the federal claims in this forum.

There would be difficulties in the management of a class action in this case. There are individual questions of fact which would be presented and there may be variations in the law to be applied.[3]

However, after due consideration of all these factors, the court finds that the questions of law and fact common to the class members predominates over the questions affecting individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy presented by plaintiffs' federal claim. The court, however, revises the definition of the proposed class as follows:

> All persons in the United States (other than General Motors Corporation, its subsidiaries and affiliates) who purchased 1977 Oldsmobile automobiles and who received Oldsmobile automobiles which, without their knowledge or consent, contained V-8 engines manufactured by the Chevrolet Motor Division of General Motors Corporation.

We do not limit the class to purchasers of Delta 88 automobiles, as suggested by defendant.

We further realize that the court's definition raises the individual factual question concerning each plaintiff's knowledge of the alleged nonconformity. The court does not find this question to predominate over the question of whether or not the defendant breached an express or implied warranty through the sale of Oldsmobiles containing Chevrolet engines. Therefore, the plaintiffs' motion for cer-

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3 The court notes that plaintiffs seek recovery under the Magnuson-Moss Act for defendant's breach of a written or implied warranty. The Act provides in the definition section, 15 U.S.C. §2301:

> "(7) The term 'implied warranty' means an implied warranty arising under State law . . . in connection with the sale by a supplier of a consumer product."

According to this definition, if plaintiffs need rely on an implied warranty, a resort to state law for the derivation of such warranty would be necessary.

tification of a class on the Magnuson-Moss Act claims is granted, and the class is certified as defined above.

One of the grounds for defendant's objection to the certification of the class is the multiplicity of individual factual determinations which would be necessitated in formulating any award of damages. Plaintiffs have responded to this by indicating a willingness to have the court initially certify the class solely for a determination of liability. Defendant, however, suggests that the wording of the statute makes a determination of actual damages an element of a finding of liability, as in a determination of liability under Section 4 of the Clayton Act, 15 U.S.C. §15. The court is convinced that the issues of liability and the fact of damage can be tried separately from the issues involved in determination of individual damages. Therefore, the class is certified for the purpose of establishing liability only.

To further ameliorate the manageability of the Magnuson-Moss Act class claim, the court in its sound discretion, declines to take jurisdiction over the pendent state law claims, including the Uniform Commercial Code claims. *See, United Mine Workers* v. *Gibbs,* 383 U.S. 715 (1966). Though the Commercial Code is uniform throughout forty-nine states, each jurisdiction has developed its own interpretation of the Code, thus leading to potentially conflicting legal authorities. Furthermore, the other state claims for fraud and misrepresentation also present the specter of a multiplicity of legal determinations, as well as the individual factual determinations attendant to these claims. Moreover, the Magnuson-Moss Act has not limited this court's authority to fashion whatever legal and equitable remedies may be necessary to right the alleged breach of warranty. 15 U.S.C. §2310(d)(1).

In accordance with the foregoing, the plaintiffs' motion for class certification as to plaintiff's Magnuson-Moss Act claims is granted. The class definition is revised by the court to include:

> All persons in the United States (other than General Motors Corporation, its subsidiaries and affiliates)

who purchased 1977 Oldsmobile automobiles and who received Oldsmobile automobiles which, without their knowledge or consent, contained V-8 engines manufactured by the Chevrolet Motor Division of General Motors Corporation.

The court in its discretion declines to take jurisdiction over the pendent state claims and *sua sponte* dismisses all claims based on the Uniform Commercial Code and state statutory and common law.

Enter:

/s/ Frank J. McGarr
United States District Judge

Dated: October 13, 1977

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

• • (Caption — MDL Docket No. 308) • •

ORDER DATED 10/13/77

Pursuant to memorandum opinion and order entered this day, the motion of defendant GM to strike Count I of the complaint and to dismiss the State of Illinois as a plaintiff is denied.—DRAFT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

• • (Caption — MDL Docket No. 308) • •

ORDER DATED 10/13/77

Pursuant to memorandum opinion and order entered this day, defendant's motion to dismiss Count III of plaintiffs Miller's complaint is granted.—DRAFT.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

• • (Caption — MDL Docket No. 308) • •

MEMORANDUM OPINION AND ORDER

In case number 77 C 1436, plaintiffs Phil and Eileen Miller seek to bring an action in Count III of their First Amended Complaint under the Lanham Act, 15 U.S.C. §1125 (a). Plaintiffs allege that defendant General Motors Corporation (hereinafter "GM"), through one of its dealers, sold plaintiffs a 1977 Oldsmobile Delta 88 which was powered by an engine manufactured by the Chevrolet Division of GM instead of being powered by an Oldsmobile engine, as advertised. Plaintiffs allege that GM's conduct constitutes a false designation of origin and a false description or representation as to defendant's goods and services within the meaning of 15 U.S.C. §1125(a), and if said acts are continued, they will cause irreparable and substantial damage to plaintiffs and the class plaintiffs purport to represent, and will result in defendant being unjustly enriched and unlawfully deriving profits and gains.

Defendant GM has moved to dismiss Count III of plaintiffs' complaint pursuant to Rule 12(b)(6), Fed.R.Civ.P. for failure to state a claim upon which relief can be based. GM contends that the Lanham Act was designed to protect

commercial competitors who are injured in their business by unfair competitive practices. Thus, GM asserts that plaintiffs, as consumers rather than competitors, have no standing to bring a cause of action based on the Lanham Act. In support of its position, GM has directed the court's attention to *Colligan* v. *Activities Club of New York, Ltd.*, 442 F.2d 686 (2d Cir. 1971) *cert. denied,* 404 U.S. 1004 (1971), wherein the Second Circuit Court of Appeals denied consumers standing under the Lanham Act. Defendant has also cited a number of other cases decided since *Colligan* which reach the same conclusion.

Plaintiffs, on the other hand, rely on *Armesen* v. *Raymond Lee Organization*, 333 F.Supp. 116 (C.D. Cal. 1971) as authority for the proposition that consumers do have standing under the Lanham Act. Further, plaintiffs contend that a cause of action for consumers is cognizable under the Lanham Act by virtue of the authority of *Association of Data Processing Service Organizations Inc.* v. *Camp,* 397 U.S. 150 (1970). Under that case, a plaintiff need only show that he was injured in fact and that his interests are arguably within the zone to be protected by a statute in order to establish a cause of action under that statute.

The court has examined the authorities cited by both parties and we find ourselves in agreement with *Colligan* and the line of cases holding that consumers have no standing to bring a cause of action under the Lanham Act. Accordingly, defendant's motion to dismiss Count III of the Miller's complaint, which was brought under 15 U.S.C. §1125 (a), is granted.[1]

Enter:

/s/ Frank J. McGarr
United States District Judge

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[1] Insofar as the other named plaintiffs, through their joint reply to the motion for class certification, have sought to adopt the Millers' Lanham Act count through a purported amendment of their complaints, the court construes GM's motion to dismiss to be directed to any complaint before the court which contains such a claim. Accordingly, said claims are hereby dismissed.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

* * (Caption — MDL Docket No. 308) * *

PRETRIAL ORDER NO. 1

Pursuant to this Court's request of July 5, 1977, counsel for plaintiffs identified on Exhibit A have met and have selected Plaintiffs' Liaison Counsel, and a plaintiffs' Executive Committee; and have agreed on the powers and duties of said counsel and Committees. The Court having been advised of these agreements and arrangements and otherwise being fully advised in the premises,

IT IS ORDERED THAT:

1. Messrs. Mulack, Block, Boyle, Clark, Hogan and Walner shall constitute an Executive Committee of Plaintiffs' counsel which Executive Committee shall direct this litigation on plaintiffs' behalf in the above captioned actions and in any such actions as may be consolidated with any or all of them hereinafter.

2. The Executive Committee's duties and powers shall be to conduct or to direct all discovery and other pretrial proceedings on behalf of the plaintiffs; to prepare and argue all motions and opposition to motions; to delegate any function with respect to conducting discovery and other pretrial proceedings to other counsel where the Executive Committee shall determine this to be in the interests of equal distribution or work-load, efficiency and economy; to consult with all plaintiffs' counsel on such matters as the Executive Committee shall determine warrants such consultation; to determine the strategy of the prosecution of plaintiffs' claims; to prepare all pleadings, amendments and supplements thereto; to manage all matters concerning Rule 23 and class aspects of the litigation; to conduct settlement negotiations with the defendants or any of them only with

the approval of plaintiffs' counsel; to marshall all information required for the prosecution of plaintiffs' claims; and to perform or to delegate the performance of any other function assigned by the court or determined by them to be in the best interests of the plaintiffs. Plaintiff's Executive Committee shall call such meetings of plaintiffs' counsel as they deem necessary.

3. The Executive Committee shall act or designate counsel to act as spokesmen for plaintiffs at pretrial conferences, subject to the right of each party to present individual or divergent positions where necessary in accordance with the provisions of paragraph 4 herein.

4. Counsel for the respective plaintiffs shall have the right to participate in other pretrial proceedings, in subordination to the Executive Committee, but such counsel shall not independently initiate any such proceedings, and shall not participate in any such proceedings independently of the Executive Committee without first having brought any independent or divergent position to the attention of the Executive Committee. In the event such controversy shall not be resolved, said matter may be submitted to the Court for resolution.

5. Messrs. Mulack, Boyle and Messrs. Hogan or Clark shall constitute Liaison Counsel for plaintiffs. All counsel shall serve all documents upon each member of Plaintiffs' Liaison Counsel at the addresses listed on Exhibit B. Liaison Counsel's duties and powers shall be to receive from all parties such served documents and to distribute such served documents and any communications or orders from the Court to all plaintiffs' counsel and Liaison Counsel Mulack shall in his office keep open for inspection during regular business hours for all plaintiffs' counsel, all papers, materials and other documents prepared or received.

6. Liaison counsel for plaintiffs shall have the power to receive all orders, notices, and other communications from the court and shall have the duty to distribute such documents promptly to all other plaintiffs' counsel and defendants' counsel, respectively.

7. Subject to further order, this order shall apply to related cases subsequently filed in or transferred to this Court, as the interests of fair and adequate representation shall require.

Dated this 6th day of July, 1977.

Enter:

/s/ Frank J. McGarr
United States District Judge

EXHIBIT A

Plaintiffs' Counsel

Melvin Block, Esq., 16 Court Street, Brooklyn, New York 11241 (212) TR 5-8703

Charles A. Pat Boyle, 77 West Washington Street, Chicago, Illinois 60602, (312) 368-1060

Michael D. Buchwach, 1701 Grant Building, Pittsburgh, Pennsylvania 15219, (412) 456-2000

Charles Clark, 727 Frank Nelson Building, Birmingham, Alabama 35203, (205) 251-5223

Abraham Goldman, 221 North LaSalle Street, Chicago, Illinois 60601, (312) 332-6576

Francis E. Goodman, 111 West Washington Street, Chicago, Illinois 60602, (312) 332-2545

Roscoe Hogan, 1201 City Federal Building, Birmingham, Alabama 35203, (205) 324-5635

John McPhee, 134 North LaSalle Street, Chicago, Illinois 60601 (312) 641-1988

Donald Mulack, 134 North LaSalle Street, Chicago, Illinois 60601 (312) 641-1988

James R. Seale, 57 West Adams Street, Montgomery, Alabama (205) 262-1673

William Smith, 1201 City Federal Building, Birmingham, Alabama 35203, (205) 324-5635

Lawrence Walner, 221 North LaSalle Street, Chicago, Illinois 60601 (312) 332-6576

Gerald Blessey, P.O. Drawer L, Biloxi, Mississippi 39533 (601) 374-2247

EXHIBIT B

Plaintiffs' Liaison Counsel

1. Donald G. Mulack, Esq.
   134 North LaSalle Street
   Chicago, Illinois 60601

2. Charles A. Boyle, Esq.
   77 West Washington Street
   Chicago, Illinois 60602

3. Charles Clark, Esq.
   903 Frank Nelson Building
   Birmingham, Alabama 35203

   or

   Roscoe B. Hogan, Esq.
   1201 City Federal Building
   Birmingham, Alabama 35203

No. 79-176

In the Supreme Court of the United States

BETTY OSWALD, on her own behalf and behalf of others similarly situated, and **PHIL MILLER** and **EILEEN MILLER**, on their behalf and on behalf of others similarly situated and **SKOKIE CENTRAL TRADITIONAL CHURCH**,

Petitioners,

vs.

GENERAL MOTORS CORPORATION,

Respondents.

SUPPLEMENTAL APPENDIX

CHARLES A. BOYLE
77 West Washington Street
Chicago, IL 60602
(312) 368-1060
Attorney for Petitioners

Of Counsel:
LAWRENCE A. WALNER
WILLIAM J. HARTE
FRANCIS E. GOODMAN
ABRAHAM N. GOLDMAN
MICHAEL D. BUCHWACH

The Scheffer Press, Inc.—(312) 263-6850

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SUPPLEMENTAL APPENDIX

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN THE MATTER OF:

GENERAL MOTORS CORPORATION
ENGINE INTERCHANGE LITIGATION.

Multidistrict Litigation No. 308

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the HONORABLE FRANK J. MC GARR, one of the Judges of said Court, in his courtroom in the United States Courthouse, at Chicago, Illinois, on Thursday, June 14, 1979, at the hour of 2:00 p.m.

PRESENT:

MR. CHARLES A. BOYLE

MR. WILLIAM HARTE
(77 West Washington Street, Room 300,
Chicago, Illinois 60202);

MR. LAWRENCE WALNER
(221 North LaSalle Street, Room 1748,
Chicago, Illinois 60601);

MR. ABRAHAM N. GOLDMAN
(105 West Adams Street, Room 2370,
Chicago, Illinois 60603);

MR. CHARLES E. CLARK
(903 Frank Nelson Building,
(Birmingham, Alabama 35203);

MR. DONALD G. MULACK and
MR. MICHAEL BENEDETTO
(228 North LaSalle Street, Room 1242,
Chicago, Illinois 60601);

MR. MICHAEL D. BUCHWACH
(Grant Building
Pittsburgh, Pennsylvania 15219);

MR. ROBERT BULLOCK
(Asst. Attorney General
Commonwealth of Kentucky
209 St. Clair
Frankfort, Kentucky 40601)
appeared on behalf of the plaintiffs;

KIRKLAND & ELLIS

BY: MR. THOMAS A. GOTTSCHALK,
MR. STEPHEN C. NEAL and
MR. JAMES D. ADDUCCI
(200 East Randolph Drive,
Chicago, Illinois 60601)

and

MR. LOUIS H. LINDEMAN, JR.
(Office of General Counsel, General Motors
Corporation,
Detroit, Michigan 48202),
appeared on behalf of the defendants.

The Clerk: MDL Docket No. 308. In the matter of General Motors Corporation Engine Interchange Litigation. For a status hearing and motions to be heard.

The Court: Good afternoon, gentlemen. Who wants to be admitted for the purposes of this hearing, Mr. Bullock?

Mr. Bullock: Yes, your Honor. I have made the motion to intervene for the purpose of being heard to insure that if the Court should decide that consumers should be paid that Kentucky, even though it has not settled the case, be included.

As I understand from talking to Mr. Gottschalk and some of the plaintiffs here there is no objection to that so I probably do not need to be heard.

The Court: You may be admitted to this case for the purposes of this hearing and I will hear you on it.

Mr. Bullock: Thank you, your Honor.

The Court: What we have to start with is a motion for leave to communicate an offer of settlement. We have a proposed form of communication. I have some objections, including a comment by Mr. Boyle and a comment by Mr. Walner, and a few other things that show up on the agenda here. But for a start, would you tell me what the current status of the matter is on the motion for leave to communicate. Has there been any change other than the objections you have here or are you riding with your motion on the form you originally tendered?

Mr. Gottschalk: We are riding the form we tendered with the exception of one additional paragraph which we submitted to the Court and the parties this week relating to the subsequent filing of the so-called transmission litigation pending before Judge Crowley. We suggested a paragraph that mentions it so that class members are apprized of it even though there has been no certification of the class in that other matter. But with that one exception General Motors is asking for approval of the form of notice as proposed. We are aware of objections filed by Mr. Boyle. We are aware of a proposed statement filed by Mr. Walner for inclusion, and we are aware of a paper filed by the Illinois Attorney General indicating that he had no objections to the form of notice that we have proposed.

The Court: All right, I have that as well.

Excuse me, Mike, I don't seem to have—I don't know whether you have this last paragraph on the transmissions—

Mr. Gottschalk: I have a copy.

The Court: May I see a copy of it, that hasn't come to my attention somehow. The mail is piled pretty deep —all right, Mr. Walner's objection—may I keep this copy, is it an extra one?

Mr. Gottschalk: Certainly.

The Court: Mr. Walner's objection, let me address myself to that first.

He thinks that the form of notice should give a little more of the flavor of the Court of Appeals decision, and he offers a proposed addition to the notice, which among a variety of other things, does make that point. I wonder, and what I would like to hear now from Mr. Gottschalk is whether at least the first paragraph of his proposed edition should not be considered for inclusion—do you have that before you?

Mr. Gottschalk: Yes, I do, your Honor.

The Court: The rest of it I think I have some negative reaction to because it is largely argumentative, but in terms of stating the facts, that the approval of the settlement for the entire class, et cetera, that one first paragraph seems to be certainly a fair and accurate factual statement, and my question is whether that should be part of the communication.

Mr. Gottschalk: We have no objection to that paragraph or words similar to it being part of the notice.

The Court: All right, I would intend then that that should be included.

Anything else—Mr. Boyle, what do you have to say about all of this, I have your pleading, of course—

Mr. Boyle: On Mr. Walner's proposed additions to the notice?

The Court: Yes.

Mr. Boyle: Well, I would suggest that the content of the proposed addition is—

The Court: Well, of course, you make your own point in your own objection that you think that there should be a fuller description of the Court of Appeals opinion—

Mr. Boyle: Do you mind if I remain seated, your Honor?

The Court: Not at all, go ahead.

For the same reason that I reject that suggestion, of Mr. Walner's part, and he makes it in some detail, I reject it on your part. I don't think the reasoning in the Court of Appeals decision is appropriate in the notice but I do think the fact of the Court of Appeals decision and a fair descriptive statement of it should be there.

Well, let's put it this way. I am ready to approve the General Motors form of notice with additional paragraphs of Mr. Walner's, subject to any further argument that anybody here wishes to make. So let me say that the burden of proof is on the objectors and I am ready to hear you. I have already indicated and I don't think you have to reargue that any detailed description of the opinion or the rationale in the Court of Appeals is appropriate, I don't think it is and you have made your record and your proposals on that.

Is there any other objection to the text of the offer as now proposed with the addition we have talked about that anyone would like to make?

Mr. Walner: Your Honor, do you intend to permit the release in its present form to go out—I think we have raised the matter, perhaps not in these papers so far, but repeatedly in the proceedings that the case was originally conceived as limited to an engine switch, and that the release is broader and as the case progressed it seemed to pick up the engine train along with it.

The Court: Your suggestion then is that the form of the release has to be modified to encompass that?

Mr. Walner: Yes, your Honor, they are asking the class to release a right that was probably not the subject of the publicity, and not the subject explicitly anyway of the original compliance.

The Court: I agree with that, that the transmission or the drive train was not part of either the publicity or the case, nor in my mind did we ever try anything but an engine case, and I think I made that clear rather frequently. Mr. Boyle felt that transmissions were an issue and I didn't and he tried hard to get it into issue and I tried hard to keep them out. I still think that we are talking here about an engine interchange case and transmissions don't belong in it. I am sure my attitude in that matter and the way I handle it is one of the reasons why a separate transmission case has been filed. So in settling this, or getting out a notice of a possible settlement offer, we are talking about an engine interchange case and I am not adjudicating the transmission issue at all.

Now does the form of the communication to the class fairly represent that, in your mind—either one of you, Mr. Gottschalk?

Mr. Gottschalk: Just to speak to that question—the release which was part of the consideration, negotiated with the State Attorney Generals and therefore part of the settlement offer does cover other components in the 1977 cars, including transmissions, and the notice makes it clear that they are releasing claims with regard to substitution of any engine components manufactured by General Motors or included in the '77 cars. So they are alerted to the fact that the release would broadly cover such claims, and with the additional paragraph we refer to the only litigation we are aware of which might possibly be affected by that release.

The Court: Well, the question that arises is whether in what I have said flatly was, is, and always will be an engine case, whether we can sneak into the release something broader than the engine and include the drive train.

The proof of the adequacy of the settlement and everything else was limited to the engines and when the attempt was made to bring the transmissions into issue I kept it out because it wasn't part of the complaint.

Mr. Gottschalk: Your Honor, my first response to that is that if the only case before your Honor was engines, as it is, and we went to the State Attorneys General and there was a dispute about transmissions, and whether they had substituted, we had entered into an agreement with the Attorneys General regarding transmissions.

Now we understood this case to be limited to engine interchange issues. Those were the only issues certified. In our negotiations with the Attorneys General, they were concerned about other aspects of the car and consideration negotiated and agreed to buy GM was in consideration of a release that would cover the various components used in any 1977 model automobile. I think the function of this Court is to be sure that the release and the notice are appropriate for the engine interchange case, but in any event, this Court should not exercise jurisdiction over that portion of the agreement that relates to matters not in issue before this Court. The appropriate thing, I think, for this Court to be concerned is that the release is adequately described in its scope in the notice so that consumers are aware that it may reach claims other than those that are pending before the Court. And we made a conscientious effort to be sure that it does put class members on notice of that fact.

The Court: I have the motion for leave to communicate offer of settlement, and of course, the text of it is basically the form of the communication or notice and I have it dated and received March 7, 1979. I assume this is the final and appropriate form that I am working with.

Mr. Gottschalk: Yes, your Honor, with the addition of that one paragraph.

The Court: With the addition of a single paragraph—well, I read in it, in the form of a notice, first at the bottom of Page 2 in the notice form:

"Plaintiffs are also asserting that General Motors substituted other power train components, including transmission and rear-drive axles."

My question is, why is that in here, that isn't what the plaintiffs asserted in the complaint and that isn't what the proof considered.

Mr. Gottschalk: Your Honor, that was in there as a matter of caution, perhaps undue caution. We knew that the objectors were pressing on this Court and the Court of Appeals that an element of this case should at some time be the question of transmissions, and we thought we should err on the side of overly full disclosure rather than omit some aspect of their claim, even though it has not been accepted by this Court as an appropriate claim to be presented in this case. That is the reason it is in there.

I might also add, your Honor, that I think it is appropriate to have reference to that allegation since the mechanical insurance coverage, at the top of Page 4, is described as covering the power train. That was part of the consideration with the Attorneys General and it included engine transmission and drive axle.

Over on Page 5, on effects of signing a release—it is clearly pointed out that they would be releasing claims arising out of the installation, incorporation and use in any '77 model automobile sold by GM related to any engine component part or assembly produced or manufactured by any division or subsidiary of GM.

So what we are doing is saying there is a latent claim in this case which plaintiffs are asserting about transmissions. That obviously does not bind this Court or us that it is appropriate for inclusion in this case, but they should know that it is there, they should know there is litigation regarding it, and they should know the effect of the release on it.

The Court: All right, let me ask the various plaintiffs then. Is it General Motors' contention that the references that I have called attention to, to the transmission and

power train assembly, are there in an effort to make more full and complete the notice and the adequacy of the notice to the people who are going to receive it. Do any one of you object to its inclusion—I am willing to leave it in, I just didn't think it was necessary, I am not sure it is appropriate but if General Motors put it in and if the various plaintiffs want it in, it is fine with me.

Counsel, what do you have to say about that?

Mr. Harte: William Harte, your Honor.

The difficulty in this case, particularly on appeal, was to identify just what was at issue at the trial level. And in the objections before the Court, this Court, one of the principal issues was that if it is an interchange litigation, engine litigation case, then the only thing that should be released should be the question of the engine interchange. And the fact that these drive train components were being thrown in is something that was never being contemplated either by the attorneys that negotiated the settlement or at least by the plaintiffs counsel who was seeking to overturn the settlement before the Court when the Court gave its initial approval. Consequently the simple answer to it is to either resist sending the offer of settlement to the class with both of these elements in it, or if the notice of offer of settlement is going to the class, that it concern only the matters at issue in this case. Now again, we urge again, of course, plaintiffs counsel are not part of the negotiations so the statements made by Mr. Gottschalk haven't been tested by any adversary proceedings, but again the simple answer is if it is the Court's approach to this case that the drive train components are not part of it, why is it in the release?

The Court: You contemplate that the release would be a surrender by the person signing it of a right to be a member of the plaintiffs' class in the transmission case?

Mr. Harte: Absolutely.

The Court: Mr. Gottschalk, do you agree with that?

Mr. Gottschalk: Your Honor, we cannot tell at this stage of the proceeding in the transmissions litigation because they are alleging that substitution of this THM 200 transmission for a 350. If it is simply a matter of divisional source selection, then I agree it releases it. If they are claiming some defect in the transmission then the release is clear that the release does not reach defect. There has been no determination of that.

The Court: Since I contended in the beginning that I was not trying any transmission issues I don't think any release should release rights in connection with a transmission claim.

Mr. Gottschalk: Your Honor, I have to step back and explain the context of where we're at in light of the Court of Appeals decision as we see it.

The release was not negotiated solely with respect to this action. The release was negotiated primarily and principally with respect to claims arising out of General Motors selection of various components in its 1977 cars. That release does not intend, as a settlement now of this case. We are settling disputes between ourselves and State Attorneys General. We have a right in that negotiation to settle them as broadly as we want, and in the absence of a class action which has before it all the issues affected by that release I think a class action Court has to be consulted only with respect to those matters being affected by the release where the class has been certified and the issues have been certified. So we are here because we are releasing claims in this litigation, and by this Court modifying the agreement of the Attorneys General in striking out sections of that to make it conform to this litigation the Court would actually be reducing the agreement as though it were a settlement of this action rather than a broader settlement, part of which impinges on this action.

Finally, your Honor, that is such a fundamental point for us and it would so vitally effect the consideration we received in that offer that I would have to say that I would

have to go back to my client and consult whether it would extend the offer if the release was limited solely to the engines.

The Court: I understand your position and I think it is reasonable from your point of view. I'm a little troubled by it though—more than a little—the fact that we had extensive hearings as a result of which I found that the settlement offer—I forget the words I used, fair or something of this sort. It was an offer that I thought was worthy of proposing to the class, as a matter of fact, enforcing on the whole class, put some sort of an imprimatur of the Court on the fairness of the settlement as a result of the hearing and listening to the evidence and listening to arguments and making a determination. I didn't make any determination of the fairness of any release or any settlement as it involved transmissions. I would suspect that a member of the plaintiffs class might say, there has been a hearing and the Court has found the settlement to be sufficiently fair, that it should be proposed to the class, and the person saying that would be in the instance of the transmission section of the release, a settlement relying on something that never really happened. That aspect of it troubles me. The cure to that I suppose would be if the form of notice adequately explained and differentiated between the fact that the engine aspect of the case, the engine interchange cases, the issue before this Court, is the issue concerning which the fairness of the settlement hearing was concentrated on and the issue concerning which basically the settlement offer is being sent out. But you should note, and if it adequately says this I would be satisfied with it, that in the release you were releasing your claims and withdrew the drive train as well which was not an issue in this case.

Do you think the notice adequately says that?

Mr. Gottschalk: I think I would be personally receptive to that sort of change because I think it may make that point clear in a way that it is not clear presently, it is really not addressed.

The Court: I think a lawyer might find it in there but I don't think the average person reading it would and I would really like to see it stated in there.

Mr. Gottschalk: I think your Honor, we can try to submit language on that. Two points, one, of course, the release was before the Court of Appeals and it indicated that the Court ought to consider having the offer go out and secondly, because of the Court of Appeals decision the notice now is totally neutral so that there should be no inference as to any finding of fairness or adequacy of any part on the release. I do agree that that part of the language would be factually correct and I would have no problem of seeing it incorporated.

Mr. Walner: Your Honor, I think we really do have a serious due process question raised, whereas your Honor framed part of it—there is a Court imprimatur put on a hearing, and permission of the settlement offer to be made, even though to all of the individual members of the class, I am not sure that the class members are going to be capable of making that distinction merely by an explanation. I submit, your Honor, that it is not proper to submit an offer based upon a hearing that did not include part of the matters the people are asked to release. The people are given no advice on the value of the engine train itself, and the transmission. They are entitled to be informed as to what the value of that is, and I think they are entitled to have the Court consider whether the offer being made falls within a threshold of fairness that should be submitted to the class. I think by the disclosures that have been made and the colloquy we have had between counsel and the Court here, it is very clear that there is a large area about which the class is simply wholly uninformed. I think that is not the context in which any class member should be asked to accept an offer or to evaluate an offer. Of course, we believe also, your Honor, that that in some measure goes to the engine aspect of the case as well. I don't want to reiterate the arguments that were made on the rights of class counsel to communicate with

the class members. We certainly think that they are entitled to advise their class members what they as appointed counsel recommend that they do and why with specifics.

The transmission aspect goes many steps farther. Not only are they denied any communication from their counsel, they are denying having had the Court have the benefit of any consideration as to the value of the transmission. They are denied any information on which to make a judgment on the basis of the value of that release. They couldn't take this offer to any lawyer and get any explanation as to whether they ought to accept this offer or not because even a lawyer looking at this offer, your Honor, wouldn't have the facts before him even on the engine, let alone on the transmission.

The Court: The settlement of a lawsuit, Mr. Walner, of any kind, class or individual, is a compromise which is based upon the recognition of the parties of the position they have at the time the lawsuit is instituted. It isn't a settlement that is arrived at after all of the evidence is spread of record and everybody has taken advantage of access to that information. I think the settlement is one where the automobile owner has got to decide, knowing that he does not have to accept a settlement, am I willing now on the basis of the car I am driving and the engine I have got, knowing what the claims are and knowing what the defenses are, fully to accept this just to get out of this litigation and get my money or do I want to see it through to an ultimate determination of the issues.

And therefore the settlement cannot communicate all of the details of the litigation that have been developed so far. We are just making the individual, the attorney the judge of the case after all of the evidence is in.

Mr. Walner: Your Honor, I am not suggesting that that be done. What I am suggesting is that the individual class member is never told what the possibilities are even claimed to be for recovery. He is given an alternative of $200 and no information. It is not like a securities case where a person knows what he overpaid for the stock or

what is claimed to be overpaid for the stock. And he can figure some limited number of damages, and even in those areas you would have a problem. Here a man is given a choice of $200 without being given any idea in the world what the upper limits of his claim may be.

The Court: That is because nobody has any such idea even in your letter nor in Mr. Boyle's, some much higher figure is mentioned, the upper limit, and I forget what it is, but it is a very high figure. That has no more basis in fact than does the $200 in terms of being an assessment of actual damages. It isn't that, it is a settlement, a compromise. I couldn't approve sending out a letter to the automobile owners which said, if you hang in in this case you may recover up to 2,000, or whatever your figure was. I have no idea whether that figure is realistic.

Mr. Walner: I am not suggesting that that be the context of it, your Honor. But he is entitled to be told what the staunchest opponents of the offer believe is possible, even the upper limit. He is certainly entitled to be told and should be told that he may get nothing, yet he may get somewhere in between the upper limit. But he should have some idea, your Honor, what his alternative is. It shouldn't be a vacuum, it shouldn't be $200 or "Guess what" because against the "Guess what" nobody is going to take "Guess what." But many people may take a chance at what they think is a possibility of an upper limit. They are entitled to that choice. I put myself in the position, your Honor, of sitting down with a non-class plaintiff and trying to advise him, if I am given an opportunity of face-to-face advice.

Now I would dare say that if I advised the client of his offer of 200, you decide whether you want to take it and didn't advise him at all what his rights were on the up side, I might very well be the victim of a malpractice claim with that kind of advice. I am suggesting that it is improper not to advise him of the possibility of what he may be able to realize and tell him he may be able to receive anywhere from zero up to that maximum contention. And the Court doesn't endorse the maximum contention, but the zealots, if you want to call them that, believe that that is within the grasp of possibility.

Mr. Gottschalk: Your Honor, I have some suggestions to make that I think would improve the posture of the notice given the contentions of the parties, the objections that we have had served on us in the last two days.

First of all, from the due process standpoint, we have tried to set forth the contentions mentioned, the allegations of transmission switching, which are not part of this case but which are now being made, and to give that information to the consumer. There have been two other suggestions made with respect to what might be done to meet the contention. The objection being stated here that there is not enough opportunity for interested class members to find out more about the prospects of their claim. One is to include at the end of the notice the name and address of counsel, both for the proponent and the objectors of the settlement. I would endorse that, your Honor, as a good objection given the position of the objectors so that there can be further communication and inquiry if the class members desire to have that.

Second of all, your Honor, if this is a matter of real concern although I don't think it need be in light of the balance that is presently in the notice—I came here today not prepared to object to some more balanced statements of position by the objectors to the settlement so long as there could be some rebuttal statement by the proponents. Now obviously this came so late there was no chance to do that and I have much objection with what has been submitted, but I think the alternative, at least in providing the name of counsel so that if people do wish to know more, if they could talk to them directly, that is fine with us. What we want primarily is to let people make their own decision, if they want more facts, give them a source where they can find them out.

The Court: The description of the litigation at the bottom of Page 2 is about as bare-boned as it can get,

there is no question about that. You can say in one respect that makes it neutral. You can say in another respect, however, that it is susceptible to Mr. Walner's objection that we are, in terms of balancing the $200 against the possibilities in the litigation it does not give the individual trying to make the decision much help.

I agree with including the name and address of counsel in permitting inquiries to counsel which can be answered any way a good lawyer thinks he sees fit to answer. I see no problem with that and I think it should be done. If you would like to attempt to flush out the description of the litigation a little bit to give both parties position a little more fully I will be happy to see you do that. On the other hand I don't want to turn this into a pro and con closing argument, which I think is wrong. I don't think that the statement of counsel that if pursued to a successful conclusion this litigation might produce $10,000 or whatever that figure is. I don't think that kind of statement or a dollar amount should be in there. It certainly can be said that certain attorneys for the plaintiff class feel that if pursued to a successful litigation the recovery would be significantly higher than $200. But if you put a figure on it I think you are pulling one out of the hat with no basis for adjudication, or no adjudication of the figure or no basis in evidence for what it might be.

Do you want to take a shot at a revision of it—these are the things I have in mind, if we modify the release and the language describing it to segregate out more definite the transmission concept. If we add Mr. Walner's paragraph in his letter which I mention earlier, and to give a little more detail and description of the litigation indicating the objectors position a little more fully and finally, including the name and address of counsel for the plaintiffs' class who are objecting and who may be contacted. I think with those things in it we may have a form which would be one that I would be much more likely to agree with.

Do you want to take a shot at that—why don't you do it—well, I was going to say why don't you try and do it jointly. The trouble with that is that when you get through Mr. Walner and Mr. Boyle, because they had some very fundamental objections, are going to have to make a record on those in any event. So maybe we'd better do it the same way you did before. You take X number of days to submit a revised form and take the same number of days to write letters objecting to it and we will have another hearing just as soon as that process is through and perhaps come up with a final approval, ten days or less—

Mr. Gottschalk: Less.

The Court: Let's make it five days, better give them ten because by the time they compose letters and mail them it will be that long before I get them and have a chance to read them. Five days to circulate a revision of the communication to the offer of settlement and the form of notice and the release, and within ten days I would expect to receive by mail any objections to it, and let's set another hearing at the end of the 15 days and see if we can—let's set the hearing for 2:00 o'clock on Tuesday, July 3rd.

Mr. Boyle, you have problems with that date?

Mr. Boyle: Your Honor, I will tell you why, your Honor, there is some discussion as to when we are going to celebrate July 4th, and July 4th I believe is the Wednesday, and then preceding is that Tuesday—some offices are off Monday—

The Court: How about Thursday the 5th. We are not going to be celebrating it after the 4th. Let's make it the 5th.

Mr. Gottschalk: That is my birthday, your Honor, I will be happy to celebrate it here.

Mr. Clark: If the Court please, while I am here on behalf of the people who are proponents of the settlement, my problem is I have a case set on the 5th.

The Court: Well, do you get the sense from the way things are going that I am a proponent of the settlement too—I think I can adequately take care of your position. I think the Court of Appeals has told us if we put it on an optional basis we can settle it. We are trying to get a fair form here and I think once we do it should be obvious to you that when I get a form that sounds what I think are the objectors genuine concern, it should go out. That seems to be a good day, I hate to change it, but I will if you insist.

Mr. Harte: Your Honor, two further points—

Mr. Gottschalk: If we are moving to a new point I would like to come back for a clarification—

The Court: Let's take care of the old point first. You are talking about the intervention now?

Mr. Harte: No, your Honor, I'm talking about the notice of offer of settlement, and its contents.

The Court: All right.

Mr. Harte: It does not include any recitation with respect to the payment of attorneys' fees. That is completely silent in this offer of settlement. I don't know what negotiations may have been entered into between General Motors—and I don't know how that point is going to be clarified, or whether the proposed offer of settlement is going to comment on it since the earlier offer of settlement did include it.

The Court: The earlier offer of settlement indicated the attorneys' fees had been agreed to independently and would not reduce the amount of settlement.

Mr. Gottschalk: Yes, your Honor.

The Court: Is a similar statement appropriate in this notice?

Mr. Clark: It has not.

Mr. Gottschalk: That would be an appropriate statement.

Mr. Clark: I think it would be appropriate. I talked with both Mr. Neal and Mr. Gottschalk, and the agreement among those counsel who, or their clients who I presume will accept the settlement offer if communicated to them, is in force and probably should be included in this.

The Court: I think a sentence describing that similar to the one in the last notice is appropriate. Let's put that in.

What do you have, Mr. Gottschalk, before we go on to anything else?

Mr. Gottschalk: On the release, your Honor, I just want to be clear. The concern of the Court is to make it clear as to the full scope and effect of the release and that it would cover things other than engines?

The Court: Make it clear first that this is an engine case, the issues adjudicated related to engines, the release is broader than the issues in this case and you want everybody to clearly understand that it includes the drive train release as well.

Mr. Gottschalk: Thank you.

Mr. Harte: The other thing I was going to bring up, your Honor, is whether the Court has passed on the question of the ability of class counsel to communicate with the class as to their opinion as to the offer of settlement. It may be that implicitly the Court—

The Court: We talked about the fact that we are putting the names and addresses of class counsel on there, that means that they are going to get inquiries, and the next question is how may they respond to them. Is that the context in which you raised the question?

Mr. Harte: No, your Honor. I would contemplate that reference to the General Motors opinion in the Seventh Circuit, that it is within the discretion of this Court to permit communication under Rule 23 with the class members by class counsel.

The Court: I think it always is. I agree with that. That is no problem. What are you suggesting, that class counsel be allowed to send out a letter indicating that they do or do not favor the entry into this settlement?

Mr. Harte: Yes, your Honor.

The Court: Well, of course, the object thus far is to try and get a form of notice that is sufficiently neutral on balance so that the parties have the facts they need to know plus their own experience with their own car to decide whether they want to settle it. If we permit a war of letters on both sides we are going to create a great deal of rhetoric which is going to serve more to obfuscate the issues than otherwise. I am concerned about it, I am reluctant to do it.

What is your position on it, what would you like to do?

Mr. Harte: The difficulty that I find is that it is my understanding that the Attorneys General are going to do just that, and that they are going to send the communication to the persons within a particular state, as to the adequacy or propriety of this settlement. This was discussed in a prior hearing. And it would seem to me to be really improper if that were to occur, and that there be no communication at all from any objector.

The Court: It is obvious to me that either there be no communication at all, or that if anybody communicates everybody can. We start with that assumption.

What was your plan, counsel, with regard to that as far as Illinois is concerned?

Mr. Mulack: If the Court please, speaking for Illinois and some of the other states there was a thought to communicate an offer but, of course, communicate a letter with respect to the offer—we did apprize the Court of that some time ago.

The Court: I do remember that now.

Mr. Mulack: Your Honor felt that it might not be improper because the Attorneys General are elected officials

and have a right to communicate with their constituents. However, if the position is that everybody has an opportunity to send a letter on their own, through their own mailing and their own cost, I agree with the Court that it might create a certain problem and that a consumer might receive three or four different letters and if that is the case we would withdraw our request to mail a letter and only have one communication go out from this Court.

The Court: My judgment is that that would be the best. I think we should send out one communication approved by the Court which is as fair a statement as we can make on the basis of the settlement, the contents of the settlement and the meaning of the release and let the parties decide what they want to do with it. The results of receiving a flurry of contrary and argumentative letters is going to do more to confuse than to help.

Let's assume this will be the only communication.

Mr. Harte: May I be heard just on that point.

At this stage there are either proponents of this settlement or opponents of this settlement. It would seem to me that the proponents of this settlement can't identify whatever they desire with respect to the propriety of this offer of settlement in the offer of settlement and in the notice. You are going to try to make that as fair as possible but it is really, really an offer of settlement to the class members. It would seem to me to be appropriate that there just be one communication to counteract that which would be a communication from objecting class counsel. That would be the fairest approach to it. Thereby you would have both sides of the story, so to speak, brought to the attention of the class members.

The Court: What about a statement in the notice itself, that X attorneys representing the plaintiffs class have approved and recommended the settlement; X numbers of attorneys have not.

Mr. Mulack: We would concur with that provision.

The Court: You have got to maintain a balance there. As I remember the facts in this case a significant number of the plaintiffs' counsel have approved or are in favor of the settlement. The number of those objecting to it is a lesser number and that might have some significance.

Mr. Walner: Your Honor, one problem with identifying counsel who opposes the settlement and suggesting people can call him, is that there are too many people in the class for that. If only ten percent of the people tried to call even all of the attorneys who oppose the settlement it would be impossible to handle it. Ten percent would be 6,700 people. If a third of the class desired to call the lawyers involved in the case, you would have over 22,000 calls. It would simply be impossible to render the advice. That is why it is essential that the position of the opponents of the settlement be outlined in some proper form, however short you want to make it, where at least the minimum points are made in some fashion. Even if it is clearly indicated that these are the contention of counsel for the class members who are opposed to the settlement. There is no other way to give the people any advice in this case.

Mr. Gottschalk: I understood your Honor to indicate that the objectors position that it is inadequate and they would hope to recover a higher sum, statements like that, would be appropriate for inclusion with some balance in the notice to indicate there are competing views.

The Court: I thought that was how we were solving Mr. Walner's problem.

Mr. Walner: I understood your Honor, as I heard it, that you were intending to overcome the problem on advice by listing the counsel for the opponents in the notice and suggesting that the people can call him for any further advice.

The Court: It was inappropriate for me to add that last sentence. There was a suggestion that the counsel be listed and I think that is appropriate in case anyone

does want to call. I think it would be inappropriate to suggest that you could call them for advice because that might precipitate the flood of calls that you are speaking of.

Mr. Walner: Well, even if you don't overtly suggest that they can call, the information is too sketchy. First of all, they don't have a sufficient basis on which to make a decision on their own and the number of people who would need advice are so large that it is impossible for counsel to service that number of people who may make inquiries.

The Court: Consistent with my hope to get a single notice and a single form of waiver and so forth, it states the situation with sufficient balance and completeness so that the individual can decide, and assuming that we can do that would you prefer that the names of counsel be not part of that at all?

Mr. Walner: Whether counsel's name is included or not included, to my mind is not material. What is material in my mind, your Honor, is that there be a sufficient statement of the position of the opponents contained in the letter so that a person is made aware, not only that there is an opposing position, but some basis of an opposing position, even if it is in the nature of a new paragraph, and what the opponents hope to achieve on a maximum basis. Now it may be if part of that component, your Honor, has a punitive component, can identify what the claim for actual damages is on a maximum basis, and identify the balance of an undertermined punitive component if it is ultimately determined by the Court to be allowable. I see no reason to not inform people of what the maximum expectation could be.

The Court: Well, we have been through that before and I am not going to allow the notice to contain boxcar figures which will raise false hopes in the individual. A statement, however, that objectors to this settlement believe that a substantially higher recovery may be the ultimate result of the litigation is certainly fair. You get into

the next question and that is if you are reflecting that there are substantial numbers of objectors to the settlement and fairly stating their position and the theory of their objection and their hope or expectation of a higher recovery if you reject the settlement, is the automobile owners are not entitled to know that these objectors represent a significantly smaller than half segment of the representatives of the plaintiffs class, and that a lot of attorneys for the plaintiffs have approved it. I think if you are going to get the statement of the objectors in so that the impression is not created that all of the plaintiffs attorneys are objecting to the settlement, that that element has to be included factually, and you are entitled to a fair statement of your objection as to what the position is, without numbers and without raising what be an unrealistic hope. I think in that context General Motors is entitled also to a statement that some significant number of the plaintiffs' attorneys, attorneys for the plaintiffs class have agreed to approve the settlement. If somebody objects then the fact that somebody recommends belongs in there.

Mr. Mulack: That is correct, we would support that statement that the State of Illinois spelling out the number of objectors and number of proponents for the reason that many arguments are being made and were indeed made this afternoon about the lack of counsel. Well, we feel that representing the majority view of the proponents of the settlement that the individual class members are in fact being notified and that there may be a majority that is against it, but we endorse your Honor's concept. We believe that more properly it would belong on Page 10 of the suggested notice.

A paragraph could be put in very simply.

The Court: Let's assume that there will be no other communications except in response to direct inquiries. I leave it to your gentlemen. If you want the names and addresses of counsel in there then you are entitled to have them in there. I would hope that you start answering

your mail in any event because I get floods of letters saying, I am writing to everybody and nobody answers me.

Mr. Walner: Do we understand, your Honor, if inquiries are received either by letter or telephone we can respond without getting permission of the Court?

The Court: That we are calling you as members of the class, as attorneys for the class you can tell them anything you want.

Mr. Harte: Your Honor, the plaintiffs motion for leave to include a statement with notice to class members is then denied?

The Court: Yes, that is denied.

Now isn't there somebody here who wants to intervene, do I remember seeing that in the file—who is it now?

Mr. Gottschalk: Your Honor, I think that was taken care of at the beginning of the hearing with Mr. Bullock from Kentucky.

The Court: Just to participate in this hearing?

Mr. Gottschalk: Yes.

The Court: All right. Anything else for today, gentlemen—the motion for leave to include a statement with the notice to class members has been denied— plaintiffs' motion for leave to include a letter to class members to vacate order designating subclasses. That is one of the things that you want to address today?

Mr. Boyle: Yes, your Honor.

The Court: All right, go ahead on that.

Mr. Gottschalk: Excuse me, your Honor. May I just interject the other items on this agenda are two motions, both of which I received at 12:15 today. I have had no opportunity to consult with my client on them. If your Honor wants to hear a discussion of them and has time for them, of course, we will honor that. But these have literally—

The Court: Items 2 and 3?

Mr. Gottschalk: Yes, Items 2 and 3.

The Court: Let's hear Mr. Boyle on them and then we will decide whether we should go ahead.

Mr. Boyle: Your Honor, with respect to Point 2. I believe in reading the opinion of the Seventh Circuit, particularly Footnote 38, it appears on Page 33 and 34, that however cautious this Court was, may have perhaps overstepped the bounds of the Federal Rules of Civil Procedure by creating a subclass for settlement purposes. I would merely ask that your Honor give your viewpoint with respect to correcting that situation, and if you are inclined to do so, I would suggest that we get on with the representation of 71,000 people plus who purchased their automobiles and have not been extended an offer of settlement, and don't appear in line for an offer of settlement.

The Court: Well, the footnote is critical of the way this was handled. I must confess, though, having read the footnote for the first time, and I haven't read it recently, I wasn't given any clues as to why. It seems that as far as I'm concerned, I can't force General Motors to make an offer to the subclass if they don't want to make one so the subclass, if the original subclass is benefitting from the settlement had any rationale in its designation we would go ahead with the settlement as to them and we would go ahead with the trial, completion of the discovery and the trial on the rest of them, the post-April 10th people. You suggest the opinion said we should not now do this, that we should proceed in some other way?

Mr. Boyle: I agree with your Honor, I suggest that we ought to move ahead with the entire case and those people who are in the class regardless if they purchased pre or post April 10th are in fact one class. And that therefore the artificial distinction created by General Motors for the purpose of flying their settlement has been indicated by the Court of Appeals to prejudice the rights

of those people who purchased after the time that General Motors has agreed to give any consideration, and therefore the discovery which has been outstanding since September of 1977, and not one deposition has been completed on behalf of the plaintiff, I might add, that the reference that the Court of Appeals had to General Motors lack of compliance with the discovery has been on file here. I would hope, together with your Honor's wishes expressed here to proceed for those people as quickly and as expeditiously as possible.

The Court: You have two concerns: One, you want the post April 10th case to go forward as quickly as possible, and I agree with that. We've still got a post April 10th case and we have got to do something about it.

Your second suggestion is that those left out of this settlement, don't take advantage of it, are no different than the post April 10th people and they all ought to be tossed back into one big class for the completion of the litigation. I have an open mind on that, I don't know whether the distinction between the pre and post April 10th people I thought had some rational validity to it. Whether after the settlement is consummated, and those who wish to take advantage of it, that distinction has a continuing validity in terms of going forward with the evidence in the trial, I would like to consider. I said I will try to maintain an open mind on that.

Do I understand you to suggest, however, that the going forward with the settlement which we are now discussing and which we now contemplate has some fatal flaw in it because of the improper designation of the subclass?

Mr. Boyle: I am not sure I understand what you mean, your Honor?

The Court: Well, if the Court of Appeals makes a flat statement to the effect—

> "The means by which the trial court attempted to create a subclass may have seriously jeopardized the right of the post April 10th—et cetera"

The trial court discretion is bound by the requirements of the rule, the trial Court overstepped the bound of the Federal Rules of Civil Procedure—the trial Court's order created a settlement subclass did not conform to the requirements of Rule 23 et cetera, et cetera.

Mr. Boyle: Right, your Honor.

The Court: I understand all of these things in terms of English and what they mean. Do they mean, however, that the Court of Appeals is saying that we cannot go forward with the opt out, the voluntary settlement procedure we are now contemplating? I don't read it that way. I don't think they mean that.

Mr. Boyle: I don't either, to be honest with you. I would suggest that perhaps your Honor enter an order nunc pro tunc relative to the—I believe the March 17th order. That namely that General Motors, since it does not have an approved fair, adequate and reasonable settlement to offer 67,000 people, they shouldn't have the shield of perhaps an unfortunate order with respect to the 72,000 people, or 71,000, who still have the same rights that they had when your Honor issued the original order of October 13th.

The Court: Well, that is based on the conclusion and Footnote 38 that the means by which the trial Court attempted to create a subclass may have seriously jeopardized the rights of the proposed April 10th purchasers. I am just unable to understand how settlement with the pre-April 10th purchasers have jeopardized the rights of the post April 10th purchasers who remain plaintiffs in the litigation with all the rights of the plaintiffs and the case is going to go forward and determine those rights so you are arguing the same thing and the Court of Appeals apparently understood your argument and agreed with you but I don't understand your argument and I don't understand what they said, frankly.

Mr. Boyle: Can anybody say it a little better?

Mr. Clark: If the Court please, one thing that bothers me—it is likely, statistically or mathematically, that you

will have pre April 10th people that do not sign the release and send it back with a case still pending here in a post April 10th class.

The Court: I am sure that will take place. As I said, I will keep an open mind as to whether we should throw them all back into the same pot and try them all together recognizing that the difference between their situations is the factual one of, either they had notice and adequate notice when they bought it or they didn't. I don't see any harm to either the post or pre April 10th people arising from that situation. They are all going to remain in the lawsuit. They are all going to have their claims adjudicated. The Court of Appeals has made that absolutely clear and I don't think anybody has any doubt about it. Whether we say that all members of the same class, or whether we are going forward with two classes, the left-over from the original class and the post April 10th class does not at this moment seem to me to be anything more than a procedural problem. I don't see any substantive consequence to it.

Mr. Clark: I know that you do not want to address it today but there is a very practical and real problem. Of the six or seven counsel who have favored the settlement, just as to what the future role of those counsel should be, having recommended one settlement.

The Court: All right, that is a problem I haven't even thought of.

Mr. Clark: It may be premature until we get to it.

The Court: I am not making any decisions on it today.

Mr. Gottschalk: Your Honor, my reaction to it is that it is the point that certainly does not affect the current offer, it is somewhat academic in light of the Court of Appeals decision which in Footnote 58, on Page 53, talks about exactly what your Honor contemplated, and that is that it may be—they similarly, even if nearly all of the offerees, except the GM settlement offer, rather an unlikely possibility since the offerees number approximately 67,000.

Those rejecting the offer would not be denied the benefit of class adjudication of their claims in the Federal Court. Their claims could be adjudicated along with those of the 66,000 post April 10th 1977 class members.

Our position, your Honor, is obviously that there is a viable and rational factual basis for distinguishing between a purchaser prior to actually the end of March and those afterward, in this case April 10th, whether or not that would cause us to come before the Court and ask for some differing treatment at trial is premature and speculative at this point.

The Court: As I remember it you have been threatening for a long time a motion for summary judgment—

Mr. Gottschalk: At the plaintiffs urging the last time we were before you I was put under the discipline of filing summary judgment briefs with respect to post April 10th purchasers by June 28th which we will have on file at that time.

The Court: All right, so we will at least delineate the issue if that post April 10th class survives that motion. Then as I said once again, it isn't a matter of substantive rights but almost a simple procedural question as to how we handled the two groups.

Mr. Gottschalk: Yes, your Honor.

The Court: I think we decided pretty much what we have today, have to decide today. The motion to vacate the order designating the settlement subclass, I am not going to decide at this time, but it certainly is without prejudice to its renewal—I will just indicate that it is not ripe for decision at this time and we will put it over. The cut-off dates on the remaining pretrial motions and discovery—I don't know whether we can set those or not. Mr. Boyle said he has got a lot to do and a long way to go. I don't know how General Motors feels about it. There has been some discovery in the case and I thought that related generally to the whole issue, all of the issues in the case. I didn't remember that we limited it to the

pre April 10th group, maybe we did, I don't remember that.

Counsel, what were you going to say?

Mr. Goldman: Your Honor, the discovery was essentially cut off, or stopped on the substantive issues in this case back in January following the settlement offer.

The Court: It was.

Mr. Goldman: And since that time there was a period when there was discovery relative to the fairness hearing issues. However, at the present time there are currently outstanding several sets of interrogatories, several sets of document requests and also, your Honor, most importantly of the ten substantive depositions that have been noticed not a single one has been finished.

The Court: Well, all right, that discovery should go forward. If for no other reason than we've got to try that post April 10th people.

Mr. Gottschalk: May I speak to that, your Honor. Again I got this motion at exactly 12:15 today. But a little bit of research that I have been able to do to get back into this situation—let me just speak to it at some length, as a matter of fact, if your Honor wants to hear argument today.

The discovery that went on prior to January of 1977 related to all issues. It was plaintiffs' discovery, not General Motors discovery. It included everybody in the class to which General Motors objected. Then it focused on the fairness hearing. After the fairness hearing we were before this Court in October from 1978. We had a conversation with Mr. Boyle, Mr. Smith in my office had, in which they discussed the outstanding discovery. Mr. Boyle, and it is on Page 12 of the transcript of that proceeding, indicated that they thought that the next step in discovery was to consolidate the fine and reduce the number of outstanding and proliferating document requests so that we know what documents they wanted before we went ahead with depositions so there would not be repeated

demands to recall witnesses as more and more documents got produced and they had agreed to do so. That is at Page 12.

At that time, however, you will recall, your Honor, that we were asked to send out the notice and that plaintiffs objected, Mr. Harte specifically objected to that, and everybody concluded that the best thing was a stay until the Court of Appeals acted.

The Court: There is no doubt in my mind that discovery either was stayed officially or should have been. I see no problem with that. The only question we are raising is, when do we start renewing it and when are we going to cut it off.

Mr. Gottschalk: Your Honor, my position on that is that in light of the types of objections that were raised to the Court of Appeals about who was in this class, who are the class representatives, who can bind the class members by taking depositions and who cannot raise an important managerial question that ought to be resolved and they can be resolved very promptly. But until that is decided under the principles established in the manual, regarding the timing of merit discovery, from General Motors standpoint, we reluctantly are going to object to proceeding ahead with substantive pieces of this case until we have a clear resolution of certain of the class issues that have now been muddied in part because of the events of the last several months, namely the Court of Appeals opinion and its various comments regarding this action.

Specifically, your Honor, we are at a situation where this offer is going to change the membership of the class. It is going to effect who the class representatives are. It is going to effect who the class counsel are. Your Honor entered a pretrial order in 1977 indicating which groups of counsel are responsible for which activities. Things fell apart after that in light of the division between plaintiffs counsel. One day I get a call from one lawyer demanding something, another day I get a call from another lawyer. There right now is no unanimity in the plaintiffs

camp. I have no idea who is actually represented the class in this situation. I don't know whose plaintiff is in and whose plaintiff is out. There are claims that the transmission issues are involved in this case. I agree with your Honor's comments today, they have never been certified, but we are bombarded with discovery requests for matters going to transmissions and other issues.

I would propose, your Honor, that the appropriate course of business is for us to get our brief on file on June 28th, the summary brief going to the post April 10th. Get the offer out. There be a date in early fall when we will have the results of that offer in terms of who has accepted and who hasn't. At that point you are going to know whether you have 12 plaintiffs counsel representing the class or four or three—who the class representatives are, and we will have to decide at that point whether there is going to be some representation of the post April 10th group versus the pre April 10th group because there are divisions between them which create conflicts in the presentation of their case. They do have to rely somewhat on different theories. What I would propose, your Honor, is that we ought to have a very early pretrial threshing out those issues of what the class composition is, who the class representatives are, what issues are going to be developed in this case, or certified, because those are indispensible in our having an intelligent program of discovery. In the meantime, your Honor, to get discovery moving I think that the plaintiffs ought to consolidate their discovery request. Submit them to us, we will be happy to sit down, particularly with respect to documents, and get those shaped up and away over the summer where we can put those to your Honor which will help focus on what issues are properly discoverable and what are outside certification. But I do have a strong objection to just proceeding with deposition notices and further discovery without some greater coordination and delineation of who is involved.

Further, your Honor, since we are on the topic, I hadn't meant to speak to it at this length today. We have always been troubled by the problem of class membership as your Honor knows, and the class was certified over our objection.

The definition of class does read, persons who without their knowledge or consent purchased cars. The proposed April 10th category makes this most acute. Maybe that will be handled by summary judgment motion. If it is not, your Honor, there is a substantial problem of one way intervention which is frankly increasingly disturbing to me as the evidence gets stale, and that is who is actually in this class. Who is going to claim at some point that they lacked knowledge about these engines. It would be extremely prejudicial to GM to await a time after some judgment was entered, assuming it might be adverse to GM and then ask people, did you have knowledge or not. Are you a member of this class. Are you bound by those determinations. I mention that, your Honor, as not something your Honor has to resolve today, but I think there is extremely difficult issues as to how this class action is managed and who the representatives are before we get into a lot of substantive discovery only to find out that somebody is going to claim that that didn't bind them, they now need another shot at one of my employees because his client interests weren't being adequately represented by the group that took that deposition.

I suggest that we have a pretrial conference, whatever your Honor would like, to try to thrash through these issues, set up a program, and in the meantime let them consolidate their discovery requests that are outstanding, bring them to us, and we will file their objections if they have objections and that will help the Court focus on the discovery issues and the discovery program.

The Court: Well, there is no doubt that the settlement offer interrupted the progress of the case which in normal course would have been handled in accordance with the principles of the manual. There is no doubt that the approval of some counsel for the plaintiffs of the settlement, or the disproval of others, has created a division which made this smooth working of the plaintiffs class as a single unit impossible. These things do have to be resolved and we have to take another look at them. I recognize them. I think there is some merit to that. The motion before me precisely is to set a discovery cut-off date. I am not

sure that I am prepared to do that now. What we are more concerned with is setting a discovery commencement date. I would like to first get the settlement matter out of the way and get the notice approved and get it out. We don't have to wait for the numerical results to go forward because we know that there is going to be some number of people that are going to refuse the settlement offer. So we are going to have—and I would assume that most of the attorneys in the case by virtue of that fact are going to stay in the case. I can't imagine anyone going to run out of clients that belong, or members of the class that aren't in either those who refuse the settlement or the proposed April 10 people. If there are, so be it. But I didn't see that as a significant change in the posture of the case. Maybe you do.

In any event, counsel, what were you going to say?

Mr. Goldman: I heartly agree with your Honor what we need is a discovery commencement date.

I was at that meeting that Mr. Gottschalk referred to that took place with Mr. Smith and between that time and now, and particularly over the last few weeks, I have gone through all of the requests that plaintiffs have served to date. I've gone through what I feel have not been replied to and what we need and I can sit down with—

The Court: Are you prepared to put that in some form that you can give to Mr. Gottschalk?

Mr. Goldman: Yes, your Honor, the first thing next week.

The Court: I wish you would do that then and that will become the basis for our consideration of what ongoing discovery is demanded and what you think you have already asked for and what you haven't got. I will deny the motion to set a discovery cut-off date. You recommence discovery of what you think is currently outstanding. You and Mr. Gottschalk can try and work that out and if you have any problems I am sure you will be in on an appropriate motion. Discovery can recommence, but in the meantime I would hope, based upon the existing brief-

ing schedule and a motion for summary judgment to get that out of the way because either way it kind of hangs as a cloud over discovery. There is an uncertainty about the case as long as that is pending.

Are you going to be able to meet the briefing schedule that we have set on that?

Mr. Goldman: On the summary judgment motion?

Mr. Gottschalk: Your Honor, it is only a reply brief.

The Court: All right, that is the only thing left. I thought I had two briefs coming. I haven't read those yet because while this was in the bosom of the Court of Appeals I felt that it was unethical to even think about it.

Mr. Goodman: We are commencing discovery by serving on the defendants are reorganized plans for what is outstanding, and then we will thrash it out.

The Court: I would like a status report from time to time to see how this settlement thing is progressing and how the discovery is progressing. You will at least have the issues clarified by counsel's request.

Mr. Gottschalk: We will be in on July 5th, your Honor. I suspect that will be an appropriate time.

The Court: That would be a good time for another status report. Let me try and summarize what we have done today.

Motion for leave to communicate the offer of settlement. is still under advisement. We are awaiting some revisions of the proposed form of the offer. Plaintiffs motion to set a schedule for a cut-off date on the remaining pretrial, motion for discovery is denied without prejudice to its renewal. Plaintiffs motion to vacate the order of March 14th creating a settlement subclass is denied. Plaintiffs motion for leave to include a statement with a notice for class members is denied.

I think those are all the matters that were up. I assume just as quickly as possible I will get the revised form and we have our July 5th date.

Mr. Walner: Your Honor, may I speak to one brief matter although it is not on the agenda and it won't affect the proposed notice or discovery discussions that have transpired today.

The Supreme Court recently decided a case involving the right of the consumers to have standing to sue under the Sherman Act, and while there is no Sherman Act count in this case the language in the Sherman Act relating to business and property very cl[illegible]ly parallels the language in the Lanham Act regardi[illegible] damage to business and property, and when we have a chance to examine the decision of the language comparisons, it is close enough, your Honor, that we intend to ask the Court to reconsider its decision with respect to the Lanham Act. It has application, we think, only because General Motors has taken a consistent position that there is no cause of action stated under the Magnuson-Moss Act, and if they should ultimately prevail in that argument on appeal, I think this Court has already rejected it, we would want reconsideration of the dismissal of the Lanham Act cause of action if it is appropriate, your Honor.

The Court: That decision was a broadening of the standard concept, as I remember it, the one you are referring to.

Mr. Walner: Well, I don't know if it was a broadening of the standing, among the bar members I know nobody really questions the best standing of the consumers to sue until the Eighth Circuit decision denying it.

The Court: Well, in any event, certainly if you raise the issue at an appropriate time. I appreciate you calling it to my attention, I will take another look at that case. I read it only very quickly in passing.

All right, gentlemen, see you on July 5th, have a pleasant July 4th now that we have provided for your enjoyment of it.

(Which were all the proceedings had in said cause on said date.)

IN THE UNITED STATES DISTRICT COURT
EASTERN DIVISION
NORTHERN DISTRICT OF ILLINOIS

IN THE MATTER OF:

GENERAL MOTORS CORPORATION
ENGINE INTERCHANGE LITIGATION.

Multidistrict Litigation No. 308

CERTIFICATE

I HEREBY CERTIFY that the proceedings had at the hearing of the above-entitled cause before The Honorable FRANK J. McGARR, on June 14, 1979 were reported by me in shorthand and that the foregoing transcript consisting of pages 1 to 55 inclusive, is a true and correct transcript of the original shorthand notes so taken as aforesaid.

.....
Official Court Reporter
United States District Court
Northern District of Illinois
Eastern Division

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN THE MATTER OF:
GENERAL MOTORS CORPORATION
ENGINE INTERCHANGE LITIGATION.

Multidistrict Litigation No. 308

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled matter before the HONORABLE FRANK J. McGARR, one of the Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois on Thursday the 5th day of July, 1979 at the hour of 2:00 o'clock p.m.

PRESENT:
MR. CHARLES A. BOYLE and
MR. WILLIAM HARTE
(77 West Washington Street, Room 300,
Chicago, Illinois 60602)
MR. LAWRENCE WALNER
(221 North LaSalle Street, Room 1748
Chicago, Illinois 60601)
MR. DONALD G. MULACK and
MR. MICHAEL BENEDETTO
(228 North LaSalle Street, Room 1242
Chicago, Illinois 60601)
appeared on behalf of the plaintiffs;
KIRKLAND & ELLIS
(200 East Randolph Drive,
Chicago, Illinois 60601) by
MR. THOMAS A. GOTTSCHALK
MR. STEPHEN C. NEAL and
MR. JAMES D. ADDUCCI
and
MR. LOUIS H. LINDEMAN, JR.
(Office of General Counsel, General Motors Corp.,
Detroit, Michigan 48202)
appeared on behalf of the defendants.

The Clerk: MDL Docket No. 308. In regard to General Motors Corporation Engine Interchange Litigation. For a status hearing and motion of entry of order approving notice of offer to settle claims.

Mr. Gottschalk: Good afternoon, your Honor, Thomas Gottschalk for General Motors.

Pursuant to the pre-trial conference on June 14th we submitted, I believe on June 21st, a revised form of class notice regarding the settlement offer, and have submitted a motion just for the record, to ask approval to communicate that offer in the form of notice attached, with a draft order appended to the motion. Although responses from the plaintiffs were due a few days ago we did not receive any until 12:00 noon today, when Mr. Walner's three comments were received by my office and at 2:00 o'clock Mr. Harte served me with written objections by other plaintiffs which we have been going over in the last fifteen minutes.

The Court: I have the objections that Mr. Boyle filed I saw them just a moment or two before I came out. I have not seen Mr. Walner's. Do you have a copy?

Mr. Walner: They were supposed to have been delivered, your Honor, I will be glad to give you another copy.

The Court: Give me a copy. They may have gotten delivered but they didn't get all the way. All right, thank you.

Well, the hearing was set in the anticipation that I would have these objections sometime beforehand and could consider them. At our last hearing we agreed on some changes in the form of the notice—Mr. Gottschalk, have all of those been incorporated in it?

Mr. Gottschalk: I believe they have, your Honor.

The Court: All right, why don't you tell me, Mr. Walner and Mr. Boyle, briefly what your objections are and let's try and dispose of it on an oral argument basis.

Are these the objections Mr. Walner has just handed up?

Mr. Harte: No, your Honor, these are the objections of Mr. Boyle, if I can address myself—

The Court: Mr. Boyle, all right, I am ready. Go ahead.

Mr. Harte: Preliminarily, your Honor, we would like to call your attention to the fact that we have just received notice of the decision in a case styled Gour vs. Dairy Motor Company, in the Louisiana Court of Intermediate Appeals, which we believe bears upon this question. I would like to hand up a copy of this decision and state that this decision was received about 12:00 noon this afternoon. It was decided June 29th. I am not familiar with any re-hearing procedures within the State of Louisiana, Intermediate Appeal Courts. But essentially it identifies and approves a remedy of recision. In that State it is called, or it is styled, annulment of a sale of an automobile for damages. It comments favorably on the theory, we believe, under the federal law, but it is based primarily upon the State Law of Louisiana which an analysis of the decision reveals is not that dissimilar from any other relief granted, including the relief provided for under the Magnuson-Moss Warranty Act. And what this does raise, however, we believe, your Honor, and this should be addressed I think to the entire notice of the settlement offer, but what this raises is rather serious and we believe substantial questions of collateral estoppel in this case as to General Motors on the issue of liability. While this was not a class action at all General Motors was able and did participate in the defense of this case, and there has been an adjudication, we believe, which bears upon the issues involved in the instant case and we expect to rather shortly move for summary judgment on the liability issues.

It also identifies a recisionary remedy which is based, which is styled I think, although annulment of a sale, it is still recisionary, which permits the automobile car owner to present the car to General Motors and seek a return of the cost of the car, or actually the sales price

less a credit of eight cents a mile for the mileage that the automobile owner used. And it also provides for attorneys' fees to the successful prosecutor, to the attorneys who successfully prosecuted the case on behalf of the automobile owner.

Given this decision, your Honor, we respectfully state that the notice as proposed by General Motors, and as supported by the Attorneys General, and possibly by other plaintiffs' counsel which reflects the statement of General Motors that it has a viable defense to the claims raised by the plaintiffs in this case as patently inaccurate. We believe that in view of this decision General Motors cannot now take the position that there is any substantial question on the issue of liability and consequently we would address that objection to the notice now proposed which permits General Motors to suggest that it has a viable defense to this case.

Now we also have articulated written objections which are before the Court and essentially they adopt objections that were set forth in the prior written objections and also adopts the oral objections made at the prior hearing in this case and also raises objections as to particular portions of the notice given to the Court, and I can go through those one by one if the Court desires.

The Court: Well, we can do that. Let me hear from Mr. Gottschalk on his reaction to the impact of this case from Louisiana on the case we have here.

Mr. Gottschalk: This case, your Honor, is one that has been brought to our attention in the past, although I would doubt that your Honor would remember it by name since it was so many months ago after the initial trial decision was rendered finding against General Motors under the law of the State of Louisiana. As this Appellate decision reflects, the order at that time was one of essentially recision without a mileage charge back to the individual plaintiff based on a theory of unilateral mistake of law which is unique and is unique to some extent to the State of Louisiana. That was brought out by objectors to

the settlement before the Court issued its final order coming out of the fairness hearing. The matter was taken up on appeal and I assume further appeals of this decision will be sought by General Motors.

I would note that it really has no bearing on this action, particularly as a legal matter for a couple of reasons. First of all it goes off on the facts unique to this particular plaintiff and there was an extended evidentiary hearing with regard to his expectation and the specific transaction which he purchased.

Second of all, your Honor, it goes off on straight law grounds and does not in any way discuss the question of warrant. It discusses the unilateral mistake of law theory in Louisiana. The Appellate decision adds to it a theory under the Uniform Deceptive Trade Practices Act which is a state law provision enacted in some states but not at all analogous in its provisions to the Magnuson-Moss Warranty Act.

Apart from that, your Honor, I would merely comment that the notice of settlement that is being proposed does refer to recision, I believe, and other equitable remedies being sought by the plaintiffs. So we don't foreclose the fact in the notice that the plaintiffs are seeking that here. Obviously, your Honor, if plaintiffs wish to bring on a summary judgment motion, collateral estoppel, or whatever, we will meet that in due course. It is not applicable any more than I believe they would say that the decision that General Motors has won in its favor based on trials, in fact particularly with respect to the post-April 10th group in which General Motors has been found not liable are binding on the claims of all post-April 10th purchasers as a matter of law.

So we regard this decision as not adding any different dimensions to this case, it is under totally different statutes. This class has been certified under the Federal Statute only which encompasses a different legal theory.

As to the remedy provided, your Honor, I think that is adequately covered in the notice.

The Court: I don't believe that this case, even though it has progressed to the Appellate level since we first talked of it has any immediate bearing on what we are about here today, and that is the approval of a form of notice. So let's go ahead with any additional comments you have on the form of notice and we will take them one by one.

Your first point, as I understand it on Page 2, has to do with reference to the substitution of other components, including transmissions?

Mr. Harte: Yes, your Honor has ruled upon that, I believe.

The Court: I think I had and if not I think the form of notice is adequate and satisfactory in that regard.

Mr. Harte: Your Honor, the second objection relates to Page 3 where it is articulated that "Some" plaintiffs also contend that General Motors substituted other powertrains.

Mr. Gottschalk: Your Honor, if I can shorten this discussion where we don't have a particular objection, based on a quick reading I understood only some plaintiffs contended—since we are talking about plaintiffs' contentions, I suggest deleting the word some and beginning with the word plaintiffs, plaintiffs also contend.

The Court: All right, that will solve that problem.

Mr. Harte: Your Honor, the third objection is covered by the Court's ruling as to Paragraph 1. The Court need not—

The Court: All right.

Mr. Harte: The fourth objection requests that you strike the words "and probably is" on Page 5, Line 6.

Mr. Gottschalk: Your Honor, on this one the plaintiffs are incorrect and have apparently forgotten the evidence in the fairness hearing record in the form of the depositions and exhibits of Mr. Sheldon Barquist. The

fact is, your Honor, that the mechanical insurance policies which are I believe being referenced here on Page 5—

The Court: The top of the page, on Page 5.

Mr. Gottschalk: They have to do with mechanical insurance policies or service contracts that people may purchase from a wide number of insurance companies. They are not the same thing as the offer of insurance coverage that General Motors made in April of 1977. These contracts, as Mr. Barquist, who is the vice-president of sales and marketing of General Motors Acceptance Corporation, vary considerably in their coverage as to the components, as to the terms of payments, premium costs—they differ in a wide variety of ways. One of the unique features and attractions of the insurance certificate that is being offered in this case, for example, it has no exclusion, no deduction and covers all aspects of the powertrain down to the last nut and bolt, and there is no other policy that we are aware of that does that. So we wanted to be sure from the standpoint of the class members that when they evaluated whether they wanted to continue on with the present mechanical insurance coverage and/or accept or reject the coverage that is being offered by way of this settlement, that they refer to their purchase policy and determine or try to ascertain the degree of difference so that they can make an informed judgment as to whether they want to have both, elect one and refuse the other. So to that extent we thought it was helpful to note this to class members so they can make an informed judgment.

Mr. Harte: Your Honor, if I may respond.

The words may be different, and it covers what Mr. Gottschalk has talked about, but the words "may be different" covers what Mr. Gottschalk has talked about, but the words "may be," and "probably is different" means that General Motors is giving an opinion, actually an attorney's opinion to the consumer which we think is inappropriate.

The Court: You can strike it without doing any harm to anybody's position.

Mr. Gottschalk: That is all right with me.

The Court: We will take "and probably is" out.

Mr. Gottschalk: If the plaintiffs are proposing that we will agree to it.

The Court: It will read: "The policies or contracts may be different from—"

I think actually that greater notice is given to the individual involved with the insertion of a phrase in that it alerts them to the fact that it not only may be different but since it probably is you better take cognizance of it. But on the other hand if the plaintiffs think it reads better the other way I don't think it is a significant point. So on the basis of the objection we will strike "and probably is."

Mr. Harte: Your Honor, the next objection appears on Page 2 of the objections, the number 5, and we address that to the portion of the notice styled, The Release. We believe that these objections, of course this objection also is covered in Paragraph 1, but there is a gloss here, we believe, on the objection or an emphasis, if you will.

The Court: It is underscored in the form I have, is it in yours?

Mr. Harte: It is, your Honor. But it is included with all of the other language relative to the release of rights which are governed by issues raised in this case. We think that that sentence, or a sentence should be lifted from that portion of the paragraph set out in another paragraph and emphasized, because when you bury this sentence in with all of the other language relative to releasing rights and claims by issues raised in this case, it kind of deludes the consumer into believing that all he is releasing is his rights and claims under the issues raised in the instant case.

The Court: I think it very clearly says to the contrary and it is underscored. The only other portion underscored is on the next page where it emphasizes the same thing. That is it bars all claims. I think that is a sufficient em-

phasis of it. I can't think of any way to make it more emphatic. So I will overrule that objection.

Mr. Harte: Your Honor, number 6 relates to placing the word "Oldsmobile" in the first paragraph, on Page 6 the second line to the bottom. Which reads now: "Motors other than the Division." It should read, we believe, "Motors other than the Oldsmobile Division of General Motors."

Mr. Gottschalk: That would be a substantive change in the release, your Honor, we would object to it. It would greatly narrow the release from the form negotiated and agreed to, and for which General Motors has agreed to make this consideration. We are talking about any engine component or part or assembly produced or manufactured by any division of GM or any supplier to GM other than the Division of General Motors which marked or sold such automobiles. If a person happened to have another 1977 GM car, the release would cover that as well as an Oldsmobile. So this is correct but to put in that language would be a narrow one.

The Court: I am trying to understand the objective point. Will you tell me again why you think "Oldsmobile" should be in there, counsel, I don't see it.

Mr. Harte: We believe, your Honor, that the designation of Oldsmobile Division of General Motors more appropriately identifies what actually occurred.

The Court: Well, what actually occurred is that everybody bought an Oldsmobile from the Oldsmobile Division of General Motors, or they wouldn't be plaintiffs in this suit.

Mr. Harte: That is correct so why not put the Oldsmobile designation in.

Mr. Gottschalk: It is because this is a description of the release not of the claims of the plaintiffs in this lawsuit. It is not an attempt to describe what occurred with respect to these plaintiffs, rather than what is the affects of signing the release.

Mr. Harte: I would understand if the Chevrolet Division of General Motors sold Oldsmobiles, then I suppose the language as it presently is included is appropriate, but since the Oldsmobile Division of General Motors sold Oldsmobiles, the Oldsmobile Division of General Motors ought to be in there. I don't understand Mr. Gottschalk's objection, frankly, and the fact that it changes something in the release document which we haven't got yet, that is just too bad.

Mr. Gottschalk: The fact is that the release document has been of public record since December 1977, but apart from that record I can try to explain this again. I don't know if it will be helpful to respond to a question, if the Court has one regarding this—let me just make it simple this way.

If an individual eligible for this settlement has had two 1977 GM cars, one Oldsmobile and one Chevrolet, then by accepting this settlement offer he releases claims with respect to any of the 1977 automobiles, not just the Oldsmobile one. As your Honor knows, this offer has been extended to the Buick purchaser, the Buick and Pontiac purchasers already. It is with that in mind that again, what we are getting at in this settlement with the Attorneys General were charges that they were making that extended far past the Oldsmobile Division to all of the other GM car divisions.

The Court: Well, all right, with that explanation I think it is reasonable to leave it as it is and we will overrule that objection.

Mr. Harte: Your Honor, it wasn't our understanding that the release documents which had been transmitted to the public were actually the release documents which were going to accompany this offer of settlement. I thought they were new release documents that were going to be drafted.

Mr. Gottschalk: We can cover that at the appropriate time, your Honor.

The Court: All right, let's worry about that when we get to it.

Mr. Harte: Thank you.

Objection 7, your Honor, was covered by the Court's ruling as to the objection in Paragraph 1.

In Objection 8, it refers to the utilization of the word "some" on the bottom line of Page 7. It is our contention that specifically with reference to the substituted transmission case that—

The Court: Well, that is a reference to not this case but the transmission case which is pending elsewhere, is that right?

Mr. Harte: That is right.

The Court: Why is it necessary to refer to that here?

Mr. Gottschalk: Your Honor, if I can suggest shortening this. We believe the word "some" is correct in this context. However, without conceding that the 200 transmission was used in all I suggest if we just delete the word "some," you will bypass any argument, just say 1970 Oldsmobiles, without involving this Court, whether it is some or all.

The Court: That solves that problem, we will do it that way.

Mr. Harte: Your Honor, the ninth objection relates to the paragraph styled, or the group of paragraphs styled, "Effects Of Rejecting The Offer." Now we think that this entire section should be deleted. Alternatively we state that if it is in, the utilization of the word rejecting should be substituted and in its place the word, not accepting, or the words, do not accept, should be substituted for reject.

The Court: Well, reject does suggest some transitory action, and the sentence is a little bit complicated. If you reject the order you don't have to do anything. It is a more subtle contradiction than that. Rejection suggests

affirmative action. As far as I see this it is neither a legal or a factual problem, it is merely a stylistic one. But if you do not accept the offer no action by you is necessary. It would, I think, say the same thing.

Mr. Gottschalk—

Mr. Gottschalk: I guess I am not following the problem.

The Court: Page 9 of the first paragraph. If you do not accept this offer, no action by you is necessary. Then change the caption, Effects of Not Accepting The Offer.

Mr. Gottschalk: That seems to be the same thing we have, so I will agree with it.

The Court: I think it is the same substantially, but if the objectors like it better this way let them have it this way.

Mr. Gottschalk: Your Honor, so we can be clear and formalize this, does it now read—if you do not accept the offer—

The Court: Right.

Mr. Harte: If you do not accept the offer no action by you is necessary. If you are a member of the Class and you do not accept the offer then you will be—et cetera. Then the caption is, Effects of Not Accepting The Offer.

Mr. Gottschalk: Fine.

Mr. Harte: The next objection, your Honor, at the top of Page 10, relates to the two sentences, beginning in the third line of Page 10. "It is likely that the parties losing at trial will appeal. The Court makes no prediction as to how or when this litigation will be finally resolved."

The Court: You object to the sentence that it is likely?

Mr. Harte: Your Honor, I object to both sentences. I don't think it is appropriate to place those sentences in the notice. It is really a leverage upon consumers to accept this offer and it is also inappropriate, we believe, for the Court to make the statement—

The Court: I think the speculation that it is likely that the parties losing will appeal is objectionable and should come out. The second sentence I would like to see an affirmative statement that however anyone may read this it does not contain any prediction or suggestion of the Court as to how this thing is going to go. I think everybody should have that point affirmed.

I would sustain the objection to the sentence, "It is likely that the parties losing at trial would appeal," but I would leave the next one in.

Mr. Gottschalk—

Mr. Gottschalk: We are obviously not trying to coerce or leverage anybody. We are trying to give full information so that the people would understand enough about the case.

It seems to me a statement, who are likely, is the problem, to the affect that the parties losing that trial will have a right to appeal—

The Court: You might say, this case may later be settled or may go to trial, and if it is tried the parties losing may appeal.

What we are trying to do is to give them the information they need without warning them, reaffirming the public's belief that all litigation goes on forever. It just seems that way, it isn't always true.

Mr. Gottschalk: To General Motors, your Honor, your suggestion is acceptable.

The Court: Let's leave it that way. The case may later be settled or may go to trial. If it goes to trial the losing party may appeal.

Mr. Harte: Your Honor, we respectfully accept to the Court's ruling and reserve our objection.

The Court: All right, you may do that.

In the next sentence, over objection, it may remain as it is.

What is the next one?

Mr. Harte: Your Honor, Pages 11 and 12, the comment is made by General Motors as to the Court of Appeals' decision in this case. We don't believe that characterizing the Court of Appeals' decision as "The Court of Appeals concluded that the settlement could not be considered as a basis for the compromise and dismissal of the entire class action without allowing further discovery to be taken and hearing additional evidence." We do not believe that that is a fair characterization of the Court of Appeals. It held, and I think the basis of the decision was a much greater, and I believe the Court may have misapprehended the basis upon which the parties had sued. Of course we do not now have the transmission and powertrain aspect in the case, but also the question of the theory, that is the comparability really is not at issue here, it is a question of valuation. It also is a question of punitive damages. It is also a question of recisionary damages as outlined in the Gour case. So we believe that that acceptance should be substantially broadened so as to give the consumer some idea of what was stated by the Court of Appeals in its decision.

The Court: Well, I think the essence of what the Court of Appeals said, for purposes of this notice and what the class should know, is that the Court of Appeals concluded that the mandatory settlement for the entire class was objectionable and they reversed it. But they did allow the settlement to go forward on an individual option basis. That is really all you have to know. If you take the sentence beginning at the bottom of Page 11, the United States Court of Appeals for the Seventh Circuit has reviewed the settlement offer and reversed the approval of the settlement as mandatory to the entire class by a—I don't think you will need the vote, reversed it is enough—as mandatory for the entire class. Take the next sentence out. The Court of Appeals thereafter, did, and leave the following sentence in—

Mr. Gottschalk: No objection to that.

The Court: All right, we'll do it that way.

Mr. Harte: Of course that doesn't give the class any information relative to what the Court of Appeals did.

The Court: All the class has to know is that the Court of Appeals didn't like it in the mandatory form but on an optional form they approved it. Other than that the only issue before the Court of Appeals was the settlement, the validity of the settlement offer and whether it can be sent out. So it will read—reverse the approval of the settlement as mandatory on the entire class. Mandatory what—for the entire class, mandatory for the entire class, period. The Court of Appeals did permit to allow—et cetera—and the rest of it is okay. The Court of Appeals concluded sentence comes out, those four lines.

Mr. Harte: Your Honor, we again would respectfully—

The Court: The record will reflect your obligation to that.

What is next?

Mr. Harte: Page 13, we object to the paragraph styled, "Separate views of parties approving of this settlement." We believe that is inappropriate, and more specifically we state that the language "Particularly because, in its view, the plaintiffs and class members are not entitled to any recovery in this litigation"—it is highly inappropriate, particularly in view of the Gour case and particularly in view of what has transpired in this litigation thus far.

The Court: Nobody has ever agreed to a settlement yet without being afforded the right to say that this settlement is not a concession of liability but just a way to get rid of the litigation. That is the standard. If an individual had to admit liability in order to settle, with whatever consequences that might have, there would be very few settlements. I think General Motors is entitled to say that they support the settlement as fair and reasonable even though they do not concede liability. I don't know whether they have to say it any more particularly than that. But particularly because is kind of a strange phrase. I don't quite understand what it means. General Motors also supports the settlement offer as fair and rea-

sonable, although in its view plaintiffs and class members are not entitled to any recovery. I think General Motors is entitled to say what they are trying to say here.

Mr. Gottschalk: The reason we said particularly because your Honor, is that it is especially fair and reasonable in light of our views that the amount of recovery will be zero, therefore anything becomes fair and more reasonable. That is the reason we said, particularly because. I am obviously not wedded to any particular language, so I am open to the suggestion of other phrases.

The Court: I think you are entitled to a disclaimer of liability in whatever minimal language it takes to say it. Particularly because, to the casual reader, would be a little confusing. I think General Motors regards this as fair and reasonable particularly because we are giving away $200 out of charitable motives, is what you are saying.

Suppose it read that General Motors—

Mr. Harte: For the first time, since the mind of man runneth not to the contrary this eleemosynary institution General Motors is donating $200 to the common good. I think, particularly because, should come out.

The Court: Let's say, General Motors also supports the settlement offer as fair and reasonable, although in its view, plaintiffs and class members are not entitled to any recovery—I think that is a fair statement and one that we will leave in. I will take particularly because out and put although in.

Mr. Harte: Your Honor, I skipped one.

The Court: What one is that?

Mr. Harte: 12.

The Court: What page are we on?

Mr. Harte: This is on Page 13, after the first paragraph styled "Separate Views Of Plaintiffs Who Object To This Settlement." We believe that there should be a comma after the word, settlement, which is the sixth line

down, and the words "Or to return the car and obtain the full purchase price." This addresses, your Honor, at least a statement from plaintiffs' counsel that we are looking not only to a return of money in the form of damages, but possibly, your Honor, a return of the car in its entirety.

The Court: The best way to say it would be to say, amount of money offered—or we will have the right of recision which won't mean anything to anybody. What we have got to do is find some grounds between the highly enticing, you can drive this car for several years, return it and get all of your money back, which may delude a lot of people into believing that this is such a good deal that they will opt for it under any circumstances. And as far as I'm concerned at least it is somewhat improbable in terms of the overall case. But if we just talk about your right of recision, that is bare-bones legalese, it isn't going to help. Can anyone suggest anything in between that will describe that right, being informative and without being inflamatory—

Mr. Harte: Yes, your Honor, if I can think about that and in about ten minutes come up with some appropriate language—

Mr. Gottschalk: Could a phrase, or other, you may recover an amount substantially higher than the amount of money offered to you as part of the settlement, or, I was going to say other equitable relief—

Mr. Harte: Your Honor, that is like the Chicago White Sox score next week, it doesn't mean anything to anybody—although the Court Reporter indicates a loss—I would say, just give us ten minutes and we might be able to come up with something.

The Court: Could we say something to the affect, they believe if you reject, et cetera, then with a comma after settlement—and are seeking to have the Court order, seeking to have the Court allow you to return the car and obtain a full refund of this purchase price. The thought being that this is what they are after and of course that

is true, on the right of the recision, but it is putting it in language that suggests that it is an expectation and not a legal theory which we are giving any sanction to at the moment.

Mr. Gottschalk: Your Honor, I would object to that. I think even the Gour case, under State Law, doesn't involve return of the full purchase price.

The Court: That is what I was going to wonder.

Mr. Harte: Less appropriate credit.

The Court: What is the appropriate credit, a reasonable charge for the mileage you put on it?

Mr. Harte: That is what Gour said.

The Court: So that is far less than the full purchase price. That is if you have driven the car a couple of years.

Mr. Gottschalk: Your Honor, Mr. Walner has a suggestion which bears on this topic. Maybe we can address it simultaneously.

In his last page, if you have it, he has a suggestion that the basis of recovery is not limited or diminished at all by the fact that your car is or may be operating perfectly and you may be entirely satisfied with it. It goes on to say—the basis of this claim is the damages, actual and/or punitive, for substituting the engine without properly informing the buyers.

This leaves it open for the parties to argue what those damages are. If you couple that with the statement, that an amount substantially higher than that offer is being extended to you plus what the basis of the claim is, that is substituting the engine without properly informing the buyers—that would seem to leave open any other relief that the class members might later get, and also satisfy Mr. Walner on that particular point.

Mr. Harte: Yes, but recision is not damages, your Honor. That is simply articulating what has been said

here a different way. You are not telling them really what the primary basis of the plaintiffs' lawsuit is.

Mr. Walner: Your Honor, I would support Mr. Harte's plea to the Court for inclusion of some indication that recision is requested or advocated. I think it is an important request that is not immediately apparent to most consumers.

Mr. Gottschalk: Your Honor, at the top of Page 3 there is language that deals with the same issue. I wonder if we could look at that as a possibility. Page 3 of the notice as drafted where we say: "Plaintiffs are seeking both compensatory impunitive damages, as well as recision and other equitable relief including replacement of the engines." We have already said that on Page 3.

Mr. Harte: That doesn't say anything, Judge, it just doesn't say anything at all about what we are seeking here. If they are entitled to say you are not entitled to anything we are entitled to say what we are asking for.

The Court: Let's try this one. They believe that if you reject the offer you may recover an amount substantially higher than the amount of money offered you as part of the settlement and are claiming the right to return the car and receive the purchase price less a deduction for use.

Mr. Gottschalk: Can I ask if all plaintiffs will agree to that as a statement of their claims?

The Court: Let me read it again because it is the first shot. I have changed one word in it, listen to it again, gentlemen. I thought of a change of one word, listen to it again and let me read it to you again and I will read the entire sentence to put it in context.

> "They believe that if you reject the offer you may recover an amount substantially higher than the amount of money offered to you as part of the settlement and are asserting your right to return the car and receive the purchase price less a deduction for use."

I have changed, claiming, to asserting, and I have put your right instead of the right.

Mr. Gottschalk: A deduction for use, your Honor?

The Court: A deduction for use.

Mr. Harte: Thank you, your Honor.

The Court: I will make that change and who wants to object for the record—

Mr. Gottschalk: Well, I don't think it is available in this case, your Honor. Without further consultation I would like an objection noted for the record.

Mr. Harte: Your Honor, of course we have objected, I believe, to the second paragraph and the separate views of parties approving the settlement. I assume if that would be our objection it would make my objection to the other.

The Court: All right, we will make that change—do you have it, Mr. Gottschalk, or should I read it again—

Mr. Gottschalk: Could we get it from the Reporter, your Honor.

The Court: Yes—is that all of it, Mr. Harte?

Mr. Harte: There is no reference to punitive damages, your Honor. It may be inferred, and you may recover an amount substantially higher than the amount offered to you as part of the settlement, that will be the damages aspect.

Mr. Gottschalk: We said punitive and compensatory damages on Page 3 an amount substantially higher, your Honor, is exactly the phrase that came out of the last pre-trial conference when we were trying to capture the concept of perhaps something a little more than the amount offered here—

Mr. Harte: I think they have the idea that we are after punitive damages.

The Court: I think we will leave it as it is.

Mr. Harte: Judge, the next objection is under the paragraph styled "Inquiries." This is in the second line, and we feel that the inclusions of the words "by telephone or in writing" to the persons listed below would be appropriate because a lot of people just don't—

The Court: Why are you doing this to poor Stewart Cunningham—

Mr. Harte: There is no telephone number for poor Stewart Cunningham.

Mr. Gottschalk: That is what we are doing for Mr. Cunningham. The prior notices, the prior class notice all listed only Mr. Cunningham as a source of contact. Now I know that they have been contacting the Court and they have been contacting me.

The Court: He got overwhelmed and then I got letters complaining that Cunningham didn't answer letters.

Mr. Gottschalk: We think it is appropriate if people want a neutral source, with the Court, who to contact, that they have the name and address of the Court, but we then add the names of two specific individuals with telephone numbers, obviously hoping that inquiries will be diverted, at least to those two people and indicate further an attorney of their own choosing or a representative of the State Attorney General.

The Court: I don't want any suggestion here that they can inquire of the Clerk by telephone because two things are going to happen, one, he is going to be inundated and secondly nobody who answers the phone down there is going to know any answers anyway.

Mr. Gottschalk: We don't say by telephone.

The Court: I agree with you, you leave the telephone number off under Mr. Cunningham and you list it under the other two attorneys. So I will overrule that objection and leave it the way it is.

Mr. Gottschalk: Your Honor, there is the suggestion, if I may, that comes to me from Mr. Benedetto of the Illi-

nois Attorney General's office and Mr. Mulack. I will show it to Mr. Harte. It would be a change of address for Mr. Mulack reflecting that he is a Special Assistant Attorney General of Illinois, care of Michael A. Benedetto, Jr., Consumer Protection Division, 228 North LaSalle Street, Chicago, Illinois 60601, with two phone numbers at Mr. Benedetto's office. They believe they will be better equipped to handle calls if they come in in any significant numbers to those phone numbers.

Mr. Harte: Your Honor, I would object to the styling "Consumer Protection Division." I don't think that is necessary to be placed within the caption, if you will, of the plaintiffs attorneys approving a settlement—reading on—does not give the appropriate, an appropriate reflection upon the attorneys for the plaintiffs' approval of the settlement.

Mr. Gottschalk: I think it is there to make sure the letters get to the right person in the right office.

Mr. Harte: I think Michael Benedetto is known within the Attorney General's office, or if he isn't, possibly he should be—

Mr. Gottschalk: Mr. Benedetto indicates that it will be no problem to delete the title, Consumer Protection Division.

The Court: Having once been in that office I am not as sure of that as he is. But I guess if he agrees we will take it out.

Mr. Harte: Your Honor, we would ask that the attorneys for plaintiffs objecting to the settlement being known as Charles A. "Pat" Boyle. I don't think that—

The Court: Well, Mr. Boyle can certainly tell us how he wants to be known.

Mr. Harte: Sometimes late at night he has difficulty mentioning his name.

Mr. Gottschalk: Which spelling of Charles?

Mr. Harte: Charles A. "Pat" Boyle.

The Court: Any way Mr. Boyle wants it is fine.

Mr. Harte: Judge, the last objection, number 16, we object strenuously to the statement within the notice that the consumer can consult with "A representative of the Attorney General of your State."

Now we have one Attorney General listed—

The Court: Just a moment, counsel, you lost me. I ran out of pages at 14—

Mr. Harte: This is Page 14.

The Court: I see it, I'm sorry.

Mr. Harte: It is the last sentence, the words "or with a representative of the Attorney General of your State."

The Attorney Generals are not a part of this case, their intervention was denied. They were styled amicus, both in this court and in the Seventh Circuit Court of Appeals. All of them appeared in supporting the settlement with the exception of three, and this was, I believe, improperly, unduly and prejudicially load this notice in favor of the proponents of the settlement. Now if we are to be fair and there are two places of which the consumer can get information, one would be Mr. Boyle who objects to the settlement, the other Mr. Mulack, or Mr. Benedetto, who approved the settlement, both on the plaintiffs' side, then the consumer can call his own attorney if he so chooses. But to put in here, he also may call the Attorney General in each state, or in their respective states, all of whom would be then equipped to give them the line, so to speak, to accept this settlement would be inappropriate.

The Court: Mr. Gottschalk.

Mr. Gottschalk: Your Honor, I think it is appropriate because it is the fact that consumers are free to consult with representatives of the Attorneys General who are already described in this notice as having been participants in negotiating this settlement. The sentence is phrased neutrally, there is no suggestion that they should contact them as a proponent of the settlement or anything

else. There are a few, obviously, the fact is there are a few who have not agreed to the settlement. The majority has. But nonetheless it seems to me particularly in view of the complaint that we are getting about the volume of calls that people ought to know one source of information about the settlement if they choose to contact it is the Attorney General of that state.

The Court: Well, that would normally be true except that the Attorneys General of the states of course have positions in this case. So despite their character as attorneys for the people of the state, they are litigants here. I think it is appropriate to strike that. We will put a period after choosing.

Mr. Harte: Those are all the objections that we have. At least I have, at this time.

The Court: Mr. Walner, do you have some?

Mr. Walner: Just a couple, your Honor.

The Court: I have yours here.

Mr. Walner: I noted that they mentioned that there were three cases opposing it. So I picked up in my papers a fourth, and as I sat here I recalled a fifth.

The Court: That is the trouble with having these hearings, they go on so long you keep thinking of things.

Mr. Walner: The fifteen-some plaintiffs in Mr. Mulack's case, I understand there were plaintiffs including the first named plaintiff in the Attorney General's case who is opposed to the settlement. We would have a greater number than the total case filed and it would more accurately reflect the exact situation if we stated that the plaintiffs in five cases opposed it. It is a small point but it does bring our number close to the seven.

The Court: What page is that on again?

Mr. Gottschalk: Page 13.

First of all, I assume the fourth case is Mr. Walner's later filed case on behalf of the Skokie Traditional Congregation—

Mr. Walner: That is correct, your Honor.

Mr. Gottschalk: With respect to that, your Honor, as phrased here, plaintiffs, you say, in three of the cases object to the settlement offer. I think it is important that we not establish any precedent here that people who filed later cases after the class certification automatically are nominated class representatives and are treated as such. While it may well be that Mr. Walner, who is plaintiffs' counsel in two cases, both plaintiffs objecting to the settlement, apparently, he definitely has those two cases, but in only one has the Court treated the plaintiffs as a class representative. Now this, as I read it, does not identify the plaintiffs being class representatives, so I don't have a problem seeing the plaintiffs in four cases pending before the Court object to the settlement offer.

Mr. Walner: Except it is now five, your Honor.

The Court: What is the fifth?

Mr. Gottschalk: The fifth, your Honor, is the fact that apparently they are alluding to the idea that because the State of Illinois has 125 plaintiffs that there might be a few of those who would object to the settlement offer whereas others support the settlement offer in the same case. So the question is how do you count that case. Mr. Walner is saying the plaintiffs in five cases, counting the Illinois Attorney General's case as one, we have counted the Attorney General's case down here as one of the seven where plaintiffs approved the settlement. Having gotten through that just cursory, your Honor, in a discussion, I am not sure as to how best to count in this situation.

Mr. Walner: If you take their literal language, your Honor, I don't know how to get around the fact that three should become five. It is simply plain facts.

Mr. Gottschalk: The Court of Appeals noted, your Honor, that it is sometimes hard in this type of litigation to delineate between the plaintiffs and plaintiffs' counsel in terms of who are really the class representatives. From

plaintiffs counsels' standpoint I think it is correct changing three to four. If you want to believe plaintiffs.

The Court: You can say plaintiffs' counsel in four of the cases, or we can say, plaintiffs in some of the cases pending object, plaintiffs in some of the cases approve and leave the number out entirely.

Mr. Gottschalk: I favor that, your Honor.

Mr. Walner: I would accept that also, your Honor.

The Court: All right, take the numbers out and put in the word, "some."

Mr. Walner: With regard to Item No. 2 on our paper, your Honor, I think the classes, the class members are entitled to be told that they were—will not be expected or asked to pay any costs or attorneys' fees on an out-of-pocket basis. I think most consumers are not aware that the class representatives assume the burden of costs and that the fees essentially are contingent. As a matter of fact I have had inquiries, a number of times, from lawyers who receive class notices who are representative of the class members and asked if there would be any obligation for fees and costs to passive class members in determining whether or not they should opt the person out of the class. So I think it is appropriate to give them this advice.

Mr. Gottschalk: Your Honor, I object to that because I just regard it much the way Mr. Harte regarded one or two things which I believe the Court accepted. For example, the statement that an appeal was likely. I don't see how the Court at this point can assure every class member that he will be held harmless from any costs, particularly attorneys' fees or other types of cost in this litigation. We are not at that point. I can see costs possibly incurred if a person wants to consult with his own attorney about this settlement offer, about whether he becomes more active in the case. Obviously those sort of costs may be incurred. There may be discovery costs, as against one or more class members, or at least expenses that people will have to bear. None of those issues can be resolved

now with the flat statement that they are absolutely immune and protected from costs and fees. We make no statement one way or another and I think that is appropriate.

The Court: Where would you suggest it go?

Mr. Walner: I would suggest it go, your Honor, after the statement that they are not obliged to do anything if they want to remain in the litigation. I think it is appropriate there to tell them that they won't incur expense. If you want to accommodate Mr. Gottschalk's remarks you can say, unless they consult their own private attorney at their own initiative. But we can certainly tell them that they won't incur any expenses from this litigation by way of costs or fees.

Mr. Gottschalk: There are class members, your Honor, that are potentially very knowledgeable corporations which bought 1977 Oldsmobiles which may very well have had knowledge we believe have knowledge of the engines, et cetera. We don't know what their position is with respect to this settlement, of knowledge or consent, but we would not propose to allow discovery to rest without pursuing at least some class members with respect to their expertise and sophistication in this area of engines, and that means they may consult with their own attorneys for that or incur expenses. I just disagree that it is factual.

Mr. Walner: Well, they are certainly not obliged to consult private attorneys, they are not obliged to consult private experts. I think they understand if they do anything unilaterally, on their own, and somewhere outside of this litigation, they would have to pay for it. I think it is important we let them know that they will incur no costs from this litigation if they simply desire to remain in the litigation and remain a passive claimant.

The Court: That is Page 9 of the second to the last paragraph. Regardless of whether they are favorable or adverse to you—that contains a handful of possibility of some adverse consequence to remaining in the case. A very general and vague hint, the word adverse, I suppose

might cause somebody to notice—and wonder whether that meant that they might be subject to some assessment of costs. But on the other hand, I agree with Mr. Gottschalk that I don't want to get out a statement which guaranties them absolute immunity from costs in connection with this suit.

Is there anything between those two positions you can think of that will resolve the problem?

Mr. Walner: I think if we tell them, your Honor, that in the event they remain a passive claimant, and undertake not to obtain counsel or experts outside of this litigation on their own initiative that they won't be assessed any costs as a result of the litigation.

The Court: Something like under normal circumstances plaintiffs remaining in the case will not be assessed any costs, would that—

Mr. Gottschalk: Yes.

Mr. Walner: Yes, I think the under normal circumstances a very reasonable phrase, your Honor.

The Court: Let's see if we can make it come out right.

Class action plaintiffs are not assessed costs—will that be it?

Mr. Gottschalk: Your Honor, the plaintiffs may be, but it seems to me under normal circumstances class members who do not otherwise participate in the litigation are not assessed costs or fees.

Mr. Walner: I would rather not use—

The Court: Passive class members.

Mr. Walner: I would rather say class members. I don't know that I want to use the word—I think the word or the phrase, who do not actively participate, may be confusing to them.

The Court: Well, under normal circumstances it is supposed to cover that.

Mr. Walner: Under normal circumstances class members other than the plaintiffs in this case.

The Court: Well, other than the named plaintiffs. How about passive class members are not assessed costs, under normal circumstances passive class members in a case of this type are not assessed costs or are not liable for costs of litigation.

Mr. Walner: That is fine, your Honor.

The Court: Passive class members in cases of this type are not liable for costs of litigation.

Mr. Gottschalk: So long as it is understood that under normal circumstances leaves open what I think we are all contemplating as being special circumstances here, we'll go along with that without objection.

The Court: All right, we will leave it that way.

Mr. Walner, anything else?

Mr. Walner: I would like Sub-paragraph A, on Page 2, Mr. Gottschalk didn't seem to object to it before, advising the people that the basis of the claim is not based on any unhappiness or malfunction of the car. That it doesn't diminish their claim in any respect. I think B, has been taken care of already—

Mr. Gottschalk: If B is out we are focusing on A, your Honor. I would object as phrased.

The Court: The problem I am concerned with is engine interchange is the heart of the lawsuit, I think it's been adequately explained and we are tending to refine this to the point where it may interfere with the comprehension of the lay reader. So I will sustain the objection to that Paragraph A and Mr. Walner's suggestion 3-A. I don't think we have to add that.

Mr. Walner: I would also like to qualify, although I don't have it in my papers, your Honor, although there is a considerable discussion about the question of the exclusion of the transmission and related components in the

case. I would like something added to make it clear that the issue is at least the subject of review for inclusion in the case by those objecting plaintiffs seeking to assert it. As it stands it is at the bottom of Page 3, your Honor. It reads that it is unequivocally been eliminated from the case, and I think the opportunity to have that further considered is something that is correct and is not included and may be misleading without that.

The Court: Well, I unequivocally eliminated it from the case. I don't think there is any doubt about that.

Mr. Walner: No, I am not suggesting that there is any doubt with that, I am suggesting only, your Honor, that we seek, if the case proceeds we will undoubtedly seek to have that reviewed.

The Court: I understand that, but as the case stands now in the context of which this settlement is going forward that issue is not in the case.

Mr. Gottschalk: Your Honor, may I just have a moment to confer on that—

The Court: All right.

Mr. Gottschalk: Your Honor, it might help a little bit. I have another problem in mind, in that sentence. It also goes to Mr. Walner's point to say, claims relating to other components including transmissions and rear-drive axles are not pending before this Court for adjudication in this litigation. I say that only because of perhaps an undue caution as a lawyer, that in this court, who really meant your Honor, Judge McGarr, not the Northern District of Illinois, and of course one transmission is filed in this District. So I think we better specify, in this litigation, so that it is clear later on when we do talk about the other transmission case, that that is other litigation. So the changes will be—I don't think we need the word now—are not pending before this Court for adjudication in this litigation. Just adding the phrase, in this litigation at the end.

The Court: Any objections to that—you think, court, might be accepted in the general sense as the Northern District—

Mr. Gottschalk: I can see some quibble about that in the future.

The Court: Well, Mr. Walner's objection troubles me only because the settlement is the settlement even though we mentioned that there are other contentions. If the substitution of engines is what the settlement is based on, then we are opening up, at least in the context of this case and this settlement, a somewhat extraneous issue, and I suppose it is necessary to mention it as it has, but to mention it only to say that it is a contention, but that issue is not pending before this Court for adjudication in this litigation and therefore it is really not part of this settlement.

Mr. Walner: Well, it is part of the settlement in the sense that they are asked to release the rights to your Honor.

Mr. Gottschalk: Your Honor, it seems to me in the first sentence what their contention is, and we can say in the second sentence, and we do, those are not pending, we can say not pending before this Court for adjudication, then we go to fully describe later on where those claims are pending. There is no confusion in this.

The Court: It is true that everybody is told that when they settle they are settling transmission claims if they have them. It covers everything. Nobody disputes that. But on the other hand, that is clearly explained at that time and that is true as it is explained and yet it is also true here that the transmission claims are not pending before this Court in this litigation. So I will add the phrase, in this litigation, and overrule the objection to the sentence as it now stands.

Anything else, counsel?

Mr. Walner: No, nothing that has not been raised.

Mr. Mulack: If the Court please, the State of Illinois would like to address itself to Point 1 of Mr. Walner's objections, those are dealing with the number of plaintiffs

that are objecting and the number of plaintiffs that are accepting the settlement.

The Court: Well, have we solved that by saying, some?

Mr. Mulack: I believe you did, but we would like to be on the record showing our concern that a great emphasis was made by objecting plaintiffs at the last hearing as to the numbers of people that were involved in the Executive Committee and arguments were made in the Appellate Court as to percentages of people who may or may not have objected to the settlement. We would state, as one of the class representatives, the State of Illinois, that we would like the language, plaintiffs' counsel, in three of the cases pending before this Court, namely leave plaintiffs' counsel in, but also them leave the number, in this case three, and in the case of those supporting the settlement, seven. The idea being that class counsel, particularly those who have argued the case, are the ones who have been involved in all of the transactions and those are the ones who are, of course, more tuned and learned on the questions presented. We would strongly urge that the Court leave in the number three as to those who are objecting and the number seven as to those who are approving, but process it by saying plaintiffs' counsel because it is really the counsel who are involved very deeply and not necessarily the numbers of the class altogether.

The Court: Is it precisely true that plaintiffs, meaning all of the plaintiffs, in any one case, has approved of the settlement. We don't really know that, do we. It is really the counsel.

Mr. Mulack: Really the counsel, that is correct, because we represent the State of Illinois, 113 named plaintiffs, that have been filed with this court. We don't know of too many of the named plaintiffs who are objecting in terms of raw numbers, so we being the State of Illinois, the class representatives would like to be on record as favoring the settlement along with the other six class representatives who have been appointed by the Court, whereas there are

only three class plaintiffs who had been named representatives who are objecting.

The Court: Mr. Harte.

Mr. Harte: Your Honor, to place in this document the fact that plaintiffs' counsel object to the settlement means that all this is is a claim by attorneys, that possibly the money isn't enough for specific clients.

The Court: Isn't that all it is, you haven't canvassed all of your clients, the members of the plaintiff class, to see how they feel about it. It is your judgment in the matter.

Mr. Harte: Your Honor, we have received information, certainly from the plaintiffs that we represent, who vehemently and violently object to this settlement and we have received information from other plaintiffs who are represented by other attorneys that they object to the settlement. As a matter of fact, some plaintiffs who object to this settlement made their opinions known in the daily newspapers.

The Court: I don't dispute that, counsel. The focus of my inquiry is, is it possible to truthfully say as to any class of plaintiffs that they all object or all oppose. Isn't it really the attorneys' expression of what they believe the best interests of the class are.

Mr. Mulack: That's right, or the class representative to have been named.

The Court: The class representatives, I should say.

Mr. Harte: It may be that the Attorney General may take that position. It is certainly not our position that we are taking a position contrary to the representative parties in this case.

The Court: No, I am not saying that.

Mr. Harte: Certainly Betty Oswald objects to this, as do the other plaintiffs we represent.

The Court: I am not suggesting any impropriety at all. I am saying that in any class I doubt that there is unanimity on the subject. I think the best way to resolve it, Mr. Mulack, is that we will leave it the way it is and let the record reflect your objection in this regard.

Mr. Mulack: Thank you, your Honor.

The Court: Anything else, counsel?

Mr. Harte: Your Honor, just one other point and I would like to reiterate this so that I'm sure it has been. That is, in the judgment of your Honor plaintiffs' counsel, as opposed to plaintiffs, and in view of the Gour decision, take the position that again this notice should not go out. At least until the Court has conducted a hearing to determine the principal question, and that is that the finding that the proposed exchange, that is the consideration providing each individual class member with a meaningful opportunity to obtain satisfaction of his claim. It is not at this stage, as I understand it, since I believe this is a very new procedure. It is not necessary for the Court to conduct a hearing and then determine the considerations appropriate to settle the case. It is, I believe, sufficient that the Court conduct a hearing to determine whether the amount of money that is being proposed is within the ballpark. In other words, that it is not "nominal consideration." I don't believe that the proceedings to date identify that kind of a hearing which will permit the Court to make the decision that $200 plus the insurance policy is something more than just "nominal consideration."

I would state to the Court very respectfully that the transmission case, being out of this case now, those issues, which separate, I suggest to you, a substantial claim of the consumer class in this case, delimits the consideration of $200 to a point where it could very well be just "nominal consideration."

So we would request again, if we haven't requested it before, that the Court has some kind of a hearing, no matter how brief or how extensive, to weight again this

question. That is, is it just "nominal consideration" which is being offered by General Motors.

The Court: Well, I won't attempt to give my reasons for that in too great detail, but I think you are entitled to some brief statement of the way I feel about that.

This is, and to my mind has always been, an engine case. A two-hundred dollar settlement, which was negotiated and arrived at by the parties was the subject of extensive hearings on its fairness. I found it to be fair and I emphasize that this doesn't mean that I found it to be nominal. I found it to be reasonably compensatory for the injury in the context of settlement as distinguished from a full-blown litigation.

As I read the Seventh Circuit opinion the problem they found with that was not on the basis of a determination of the reasonableness of the settlement. But basically it was because of what they regarded as an inappropriate limitation on some aspects of discovery prior to the hearing. I think the Seventh Circuit has very clearly told me that while they had very great difficulties with the settlement as a mandatory settlement, if it were optional to the parties they think it would be fine. General Motors seized upon that to make it optional and that is where we are. We now have a formal notice of the settlement. I have listened to the objections and ruled on them. I intend to approve the notice in the modified form that we have arrived at today.

I do understand your position, Mr. Harte, and it is obvious from my remarks that I don't agree with them. So you have made your record and we have got our form of notice and let's get it out. What's the timetable on it now?

Mr. Gottschalk: Your Honor, I think the notice can be printed within a matter of—everything should be ready to go out in three to four weeks, maximum, now that we have the form of notice.

The Court: All right, gentlemen, let's set a status report for September 21st just so I don't lose track of

you and you don't lose track of me. I assume the notice will be out and we will have some estimate of the extent of meaningfulness of the response by that time.

Mr. Boyle.

Mr. Boyle: Your Honor, if I may, please. Perhaps you have ruled upon the advisability and I didn't hear you, perhaps you can tell me again.

We sought at one time, as you know, to provide a letter indicating the position of the representative parties as well as their attorneys, vis-a-vis the case, and I know that you refused that motion. But I also ask, in light of the decision in terms of the publicity that has been attendant with the settlement, and what I foresee to be the publicity of forty-seven Attorneys General and General Motors and six of our co-counsel who have agreed with General Motors to accept $360,000, that General Motors certainly will have a lot of support for this $200 settlement. I say, perhaps, that maybe you can consider that General Motors, although the plaintiffs are not permitted to give their opinion with respect to the fairness of this offer, of where this case is going, or even in the light of Gour, where you had a single plaintiff versus General Motors, to perhaps your Honor consider enclosing a copy of the Seventh Circuit Court of Appeals' opinion to the class members to show them and to explain to them that General Motors' activities and actions that were brought forth in an extensive hearing before you, and that the ramifications that the Court of Appeals alluded to with respect to the punitive aspects of this case. I think it would be neutral in some instance. I don't believe this country is such that attorneys who represent parties are in the position that I kind of find myself in today, in the objecting plaintiffs, namely there are 67,000 people who do not know the facts in this case and do not know that there were Chevrolet engines with Oldsmobile bodies that were sold as Oldsmobiles.

I would suggest, respectfully, that a meaningful way, in order to get the people thinking about this case, is to

include a copy of the opinion. I wish you would just consider it.

The Court: Well, both sides have had input, and I have attempted to profit by that input to get out a notice which I think is a balance and fair presentation. I think we have achieved that as well as it can be achieved. The motion to include the Seventh Circuit opinion in this or any other communication is denied.

Mr. Boyle: Thank you, your Honor.

The Court: Did you have anything else, Mr. Boyle?

Mr. Boyle: Yes, your Honor. If we are going to get inquiry with respect to other pending litgation I have already asked General Motors and I got a very curt reply. I think it is incumbent upon General Motors to provide plaintiffs' counsel with a up-to-the-minute report on all pending litigation involving General Motors and the charge of engine substitution and/or transmission substitution. We learned for the first time today, four hours ago, General Motors, with its legions of attorneys at the trial level, and now affirmed in the Appellate Court of Louisiana, is subject for one car alone of over $9400. General Motors, as we know, the minute that you approved this settlement, ran out throughout the entire country—I have heard from counsel from both sides of the ocean—they have agreed with them to settle their cases, to pay $60,000 for their concurrence of this settlement. I think that fact, as to why everybody is in favor of this settlement, should be, and should get, some appreciation as to why this settlement has received such unanimous endorsement among forty-seven Attorneys General, seven co-counsel and General Motors. We are going to be asked on the phone, Mr. Boyle, what is the status of my case, so and so, or where is the case going. We don't know. General Motors is now sitting on what I suggest might be agreement. We have seen the agreements here. I know of agreements in three other states. I am just saying, if we are asked to comment on the facts we ought to have the facts. I don't think the Court has the facts. So I suggest that you ask them,

please, to provide us with the information relative to all other pending cases in the country.

The Court: Mr. Gottschalk.

Mr. Gottschalk: Your Honor, first of all, I take strong exception to the tenor and substance of Mr. Boyle's remarks. But to focus specifically on Page 7 of the notice, it is proposed and it will be done that every pending class action case involving class members, engines and cars, will be identified by caption as a pending case in that state. We will be happy to provide the information as to the case named, and the plaintiffs' counsel, to that extent, in all the cases that will be identified wherever class actions are pending which may involve any of the class members here. I have no problem with that. Beyond that I am not sure what Mr. Boyle wants or would need me to do.

Mr. Boyle: If I may respond briefly. When they have gone out and settled a case and made the same deal with other plaintiffs' attorneys representing, or purporting to represent class actions, I suggest that pending doesn't make any difference. That is where they haven't made a deal with somebody. I suggest to the Court that we be entitled to show or to have as facts the information that would indicate to us what has happened to those other losses. I don't think it's really unfair to ask General Motors, who is now faced, frankly, as little as we now, and there might be more Gour cases, frankly. This is here for liability only and if there is any question in anybody's mind in this courtroom as to what General Motors did, the Appellate Court said that they did it for profits, to put money in their pockets, and the point is that General Motors has in fact settled many of these cases and the deal that they made I suggest is the same deal that they made with respect to six of our co-counsel in here, the seventh being the Attorney General of the State of Illinois. I think that goes to the peoples' right to know as to why there is such unanimity among those people who are approving the settlement even though the Court of Appeals has said that the case was decided, or at least conceived

in terms of the settlement in a way which prejudiced those members who are now being given a notice by the same people who, you know, co-prejudiced them.

Mr. Gottschalk: The only people, your Honor, who are being identified as class members and participating in the approval of this settlement are the Attorneys General and six private counsel and General Motors. As to all of those the terms, conditions of the settlement to the extent they are relevant to all, including why the agreement, with respect to the fees and the other elements of consideration are fully disclosed. It seems to me to that extent all of the information is presently available to Mr. Boyle. Now he is talking about a number of individual cases which have been settled on terms that are not more favorable than the terms of these cases here, and he has made a point of that. But they have nothing to do with the class representation or with the extent of approval or disapproval as it is being communicated by this notice or publicly.

The Court: I am not precisely sure what you are asking General Motors to do. I certainly have the gist of it. I don't agree, Mr. Boyle, that that should be done so I won't enter any order to that affect.

You mentioned, and I am totally unfamiliar with the Gour case in the form that I have before me today that was just handed up. You mentioned something about ninety-seven hundred dollars.

Mr. Boyle: That's right.

The Court: Is that what Gour is getting?

Mr. Boyle: He is getting $8,122. His attorney is getting $2,000 and 1300 is roughly being taken off at 8 cents a mile.

The Court: So he is getting the value of the car.

Mr. Boyle: Less 8 cents a mile.

The Court: Less mileage or charge for use as we put it.

Mr. Boyle: He is getting sixty-nine-hundred dollars, roughly, or sixty-eight-hundred dollars.

Mr. Gottschalk: I don't have any idea what the computation is, but the formula is correct under that decision. It may well be appealed further.

The Court: I just wanted to be sure that the Gour decision included, as I thought it did, some reduction from the purchase price of the car for whatever use he had on it.

Mr. Harte.

Mr. Harte: The Court has set this for status on September 21st. They have stated that it will be three or four weeks before the notice goes out. Is there a time limitation by which a person accepts?

The Court: What does the notice provide?

Mr. Gottschalk: Sixty days.

The Court: I have no thought of anything except to get a progress report on how it was going and maybe that date is too early.

Mr. Gottschalk: To accept this offer you must within sixty days after you receive this letter—

Mr. Harte: Sixty days is sufficient, your Honor, as far as we are concerned.

The Court: You figure it will be out about the first week of August—

Mr. Gottschalk: That will be about right.

The Court: So that will be about right, let's let that date stand.

Mr. Harte: The second thing that I would bring up would be the release form. There has been a lot of water under the dam, so to speak, and I am just wondering if the same release forms or the acceptance papers are to be supplied.

The Court: Didn't I approve the release form somewhere down the line a while ago?

Mr. Gottschalk: It was attached to our Attorney General's agreement filed with this Court in December of 1977. There are two forms which are the agreed upon forms. One is a claim form, your Honor, and one is the release form. There was a typo, a prepositional typo. We corrected that on the top of the form for the plaintiffs, and with respect to the release it is exactly the same form with the Buick and Pontiac purchasers. This will be printed back to back and will be sent with the notice. It will be the claim form and release referred to in the notice. The only amendment to that, your Honor, is with respect to the claim form. There are a few states where this offer has also been approved for communication and we will add a paragraph in those few states which makes it clear that although they may get two notices from different courts there is only one offer, they are not to assume by filling out two of these things that they can get double compensation. I will give these to Mr. Harte and Mr. Boyle. They are identical with those exceptions to what has been filed previously.

Mr. Harte: Your Honor, if we have objections to these papers, why possibly—

The Court: You might bring them to my attention.

Mr. Gottschalk: Those have been pending for several months.

Mr. Harte: I didn't know, frankly, nor did anybody on our side, that these were the papers that you were going to supply with this offer.

Mr. Gottschalk: I will find transcript references, there is no question that that has been represented to the Court.

Mr. Harte: Then I made a mistake. That is why we have erasers on pencils. But I would like to have time, possibly two weeks—

The Court: Not to the extent that it will delay the schedule here. I assume they will have to be printed.

Mr. Harte: I am not suggesting, but at least some time to address objections to them.

Mr. Gottschalk: We have been through Mr. Walner's objection to these forms. This Court has held considerable colloquy on these forms already, your Honor.

Mr. Harte: Judge, all I want, frankly, is three days, and the Court can rule on the objections by the mail. They are going to take three or four weeks to get all of this together.

Mr. Gottschalk: We are going to be printing, which is the problem.

Mr. Harte: I agree with you, but I just don't see—

The Court: Well, you have had them, they have been in the file and we have talked about them and it did not occur to me that anybody had any objections to those. I thought they were pretty well fixed. Go ahead, Mr. Gottschalk, with your program and order the printing and so forth. If you want to get to me by messenger or by letter any written objections to these, let's say by—today is Thursday—by Monday or next week, and if I determine that it gives me any real concern I will call the parties and set the matter for an immediate hearing, otherwise I will just write to you and indicate there is no problem. So why don't you do that.

I guess that concludes our business today, gentlemen. I will see you then, I think I said on September 21st.

Mr. Gottschalk: Fine, your Honor. A confession or error, because of a personal situation we are remiss in getting our summary judgment reply brief in, we will have it in tomorrow with a motion to file instanter.

The Court: Well, why don't I grant the motion today. file it tomorrow.

All right, that will be all counsel—I would appreciate it if you would all clear out quickly because there is another case awaiting in the spectator's section.

(Which were all the proceedings had in the above-entitled matter on the day and date aforesaid.)

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE GENERAL MOTORS CORPORATION
ENGINE INTERCHANGE LITIGATION

MDL DOCKET NO. 308

NOTICE OF OFFER TO SETTLE CLAIMS

This Notice is directed to each original owner (other than General Motors franchised dealers) of a 1977 model Oldsmobile who satisfies both of the following two conditions.

1. The owner must have entered into a written purchase contract, dated on or before April 10, 1977, with a General Motors franchised dealer or his representative for a new and unused 1977 Oldsmobile; and,

2. Such 1977 Oldsmobile must have been delivered to the owner equipped with a V-8 engine produced in a General Motors plant operated by the Chevrolet Motor Division of General Motors.

If you meet of these conditions, you should carefully read this Notice in its entirety, and make sure you understand it before taking any action based upon it. If you do not meet both conditions, this Notice is not directed to you, and you should disregard it.

OFFER TO SETTLE CLAIMS

This Notice communicates an Offer of Settlement of $200 and transferable mechanical insurance coverage, as described below, which is being made by General Motors Corporation, a defendant in this and other litigation concerning 1977 Oldsmobiles equipped with Chevrolet pro-

duced V-8 engines. If you meet both conditions above, then you are eligible to consider the Offer of Settlement.

This Notice describes the Settlement being offered, the claims being asserted against General Motors and the effects on your rights of either accepting or rejecting the Offer of Settlement. You may have received an earlier notice from the Clerk of the Court dated March 16, 1978. The description of the Settlement Offer and the effects of accepting it are as set forth in this Notice, and you should disregard the description provided in the earlier notice.

In allowing this Notice to be communicated, the Court does not indicate any opinion or finding that the Settlement described below is fair or adequate. Nor does the Court express any opinion that you should either accept or reject this Offer of Settlement.

DESCRIPTION OF THIS LITIGATION

In this class action litigation, plaintiffs are alleging, on behalf of themselves and the class they represent, that General Motors violated the Magnuson-Moss Warranty Act, a federal statute, by failing to disclose that the 1977 model Oldsmobiles which they purchased were equipped with V-8 engines produced in General Motors plants operated by its Chevrolet Motor Division. Plaintiffs allege that there is a difference in the quality and value of the Chevrolet and Oldsmobile engines. Plaintiffs are seeking both compensatory and punitive damages, as well as rescission and other equitable relief including replacement of the engines. They also are seeking attorneys' fees and costs incurred in the litigation.

General Motors denies plaintiffs' allegations and asserts that the Chevrolet engines were comparable to the Oldsmobile engines in all material respects and they met General Motors' engineering standards, and further that its conduct has been lawful in all respects. General Motors has asked that the actions be dismissed and that plaintiffs and class members recover nothing.

The only issues before the Court raised by complaints and certified by the Court for the class action pertain to the alleged substitution of engines. No trial has been con-

ducted, and the Court has made no decision concerning the claims of the plaintiffs. Therefore, this Notice should not be interpreted as an opinion of any kind about the validity of any of the claims or defenses being asserted in this litigation.

Plaintiffs also contend that General Motors substituted other power train components, including transmissions and rear drive axles, in place of components allegedly warranted as being standard equipment on those Oldsmobiles. Claims relating to other components including transmissions and rear drive axles are not pending before this Court for adjudication in this litigation.

TERMS OF OFFER TO SETTLE

In return for a Release of claims, General Motors offers you a cash payment of $200 and, if eligible, transferable mechanical insurance coverage, as explained below.

Cash Payment

General Motors offers to you, as an eligible original owner of a 1977 Oldsmobile, the total sum of $200.00.

Transferable Mechanical Insurance Coverage

If you still own your eligible 1977 Oldsmobile described above, General Motors also offers you transferable mechanical insurance coverage in the form of a Special Mechanical Performance Certificate underwritten by Motors Insurance Corporation covering the power train (engine, transmission, and drive axle) of your 1977 Oldsmobile automobile for 36 months or 36,000 miles from the date of original delivery of that automobile to you, whichever occurs first. Many of you already have received free from General Motors a non-transferable version of the Special Mechanical Performance Certificate which otherwise offers identical coverage.

If you no longer own your eligible 1977 Oldsmobile described above, General Motors also offers you the transferable mechanical insurance coverage on any one 1977 model General Motors passenger automobile of which you

are still the original owner. The mechanical insurance coverage commences from the date of delivery of the insured automobile to you. If you do not still own the eligible 1977 Oldsmobile or another eligible 1977 General Motors passenger automobile as described above, you will not receive the insurance coverage and certificate.

Some of you who are eligible to receive the insurance certificate may previously have purchased a mechanical insurance policy or mechanical service contract covering your 1977 Oldsmobile or other eligible 1977 General Motors automobile which may still be in effect. The protection offered under those policies or contracts may be different from the protection afforded by the Special Mechanical Performance Certificate offered as part of this Settlement. The protection afforded by each policy or contract must be determined by reference to its particular terms and conditions. Similarly, in the event there are questions about any cancellation or refund rights relating to such policy or contract, such rights are determined by reference to the terms of the particular policy or contract.

The Release

In return for the above described cash payment and, if eligible, insurance certificate, each of you who wishes to accept the offer must sign a Release of claims. The Release you will be required to sign should you choose to accept this Offer of Settlement is enclosed with this Notice. *Once signed, the Release will significantly and finally affect your legal rights. You should note that the release covers claims which are not pending before the Court in this litigation, as well as claims which are before the Court. You should therefore read the Release, and the discussion of the Release which follows, very carefully.*

EFFECTS OF SIGNING THE RELEASE

The Release will release General Motors, its subsidiaries, affiliates, directors, officers, employees, successors and its independent franchised dealers from any and all claims which you may have now or in the future based upon, arising out of, or relating to, the installation, incorporation,

or use in any 1977 model automobile produced, manufactured, assembled, advertised, merchandised, or sold by General Motors or any of its franchised dealers of any engine, component, part, or assembly produced, manufactured, or assembled by any division or subsidiary of General Motors, or any supplier to General Motors other than the division of General Motors which marketed or sold such automobile.

If you choose to accept the Offer of Settlement, you will *not* be required to release any claims you now have or hereafter may have against General Motors or any of its dealers arising out of any defects in the design, material or workmanship of any kind in their automobiles.

The Release will permanently and forever bar you, if you accept the Offer of Settlement, from any future or further recovery for claims being asserted in this litigation, and your claims will be dismissed with prejudice by this Court. The Release will also permanently and forever bar you from suing or recovering on *all claims* covered by it, regardless of whether those claims arise under federal, state or common law and regardless of whether or not those claims are presently, or may later be, the subject of this or any other pending or future litigation brought by you or on your behalf. By accepting the Offer of Settlement and signing the Release, you will have no right whatsoever to participate in or receive part of a later recovery, if any, against General Motors or its dealers, whether by judgment, settlement or otherwise, and regardless of whether such recovery may be more favorable than this Offer of Settlement.

General Motors is currently aware of litigation pending in California, Connecticut, Florida, Louisiana, Minnesota, Missouri, New Jersey, Ohio, Oregon and Texas, in which the complaints filed with the courts include class action allegations on behalf of certain residents of those states who purchased 1977 Oldsmobile automobiles and received such automobiles equipped with V-8 engines produced in a plant operated by the Chevrolet Motor Division. The

caption of the lawsuit that is pending in [state] is: [caption to be inserted in notices sent to residents of state in which action is pending.] By accepting the Offer of Settlement and signing the Release, you will have no right whatsoever to participate in or receive part of a later recovery, if any, against General Motors or its dealers in such state action.

The release will also affect other claims which are not pending before this Court. Other lawsuits have recently been filed against General Motors charging that it has violated the Magnuson-Moss Warranty Act and other laws by allegedly substituting a THM 200 transmission for a THM 350 transmission in 1977 Oldsmobiles and other General Motors automobiles. There are currently three separate lawsuits of this nature and their captions are: *Skelton* v. *General Motors Corp.*, No. 79 C 1243, United States District Court for the Northern District of Illinois; *Haskins* v. *General Motors Corp.*, No. 79 CH 1949, Circuit Court of Cook County, Illinois; and *Leonard M. Groupe P.C.* v. *General Motors Corp.*, No. 79 CH 2260, Circuit Court of Cook County, Illinois. Each of these lawsuits claims to be brought as a class action. You may be one of the individuals within one or more of the alleged classes. There has been no judicial determination as to the merits of any of those lawsuits or as to whether they are proper class actions. By accepting the Offer of Settlement and signing the Release, you will give up the right to assert, or to have asserted on your behalf, claims as described in the release regarding the transmission in your automobile, including some or all of the claims which may be asserted in the transmission lawsuits. In accepting the Offer of Settlement and signing the Release, you will *not* be required to release any claims you now have or hereafter may have against General Motors or any of its dealers arising out of any defects in the design, material, or workmanship of any kind in the transmission installed in your automobile.

HOW TO ACCEPT THE OFFER

If you decide to accept the Offer of Settlement, you must fill out the enclosed claim form and, on the reverse side, fill out and sign the Release. Once you have filled those out and returned them, a check in the amount of $200.00 will be mailed to you directly by General Motors. Provided you still own an eligible vehicle, you will also be sent the transferable insurance certificate. Upon your receipt of the check—and, if you are eligible, the certificate —the Settlement will be complete and the dismissal of claims in this action, as well as the Release of claims, as described above, will be fully and finally effective as to you.

To accept this offer, you must, within 60 days after you receive this letter, (1) complete the enclosed Claim Form, (2) complete and execute the Release which is on the back of the Claim Form, and, (3) return the Claim Form and Release to Oldsmobile Division, P.O. Box ....., Lansing, Michigan. A stamped pre-addressed envelope is enclosed for your convenience.

If there is more than one owner of the vehicle, all co-owners must sign the Release. If the owner of the vehicle is a corporation, the Release should so indicate and be appropriately acknowledged by an officer and his corporate title provided.

EFFECTS OF NOT ACCEPTING THE OFFER

If you do not accept the offer, no action by you is necessary. If you are a member of the class and you do not accept the offer, you will be bound by such future orders and dispositions as may be entered in this litigation, including any final judgment, regardless of whether they are favorable or adverse to you. Under normal circumstances, class members in cases of this type are not liable for costs of litigation.

Plaintiffs in this suit intend to pursue their claims and those of the class they represent. General Motors intends to defend this litigation and contests the Court's pretrial certification of it as a class action. This case may later be

settled or may go to trial. If it goes to trial, the losing party may appeal. The Court makes no prediction as to how or when this litigation will be finally resolved. If plaintiffs prevail, you may recover a greater or lesser amount of money than is offered to you now and the plaintiffs may recover attorneys' fees and costs. If General Motors prevails, you will receive nothing from this litigation.

In addition, there are other lawsuits pending, and other suits may later be filed, against General Motors concerning the same or related claims and you may be a party to or a class member in one or more of them. If you are a party or a class member in such other lawsuit(s), the first suit to come to a final judgment may affect your rights to proceed with and to recover any judgment in any other suit, regardless of whether the other suit is based on the same or a different legal theory. If the judgment entered in the first suit to reach a final disposition is favorable and you are awarded money damages, you may be barred from recovering any additional award in the other suit(s). If the judgment entered in the first suit to reach a final disposition is adverse to you and you are not awarded any recovery, you may be barred from obtaining any recovery that may be awarded in the other suit(s).

ADDITIONAL BACKGROUND INFORMATION

The Offer of Settlement is part of a settlement agreement concluded between General Motors and 44 state attorneys-general on December 19, 1977. Those attorneys-general either had filed or were threatening to file suits against General Motors relating to the engines used in 1977 Oldsmobiles. Those attorneys-general agreed to dismiss (or not to file) their lawsuits and to support any request by General Motors in a class action suit to communicate the Settlement Offer to eligible owners. Subject to necessary court approvals, General Motors agreed to extend the Offer of Settlement to eligible owners and to pay $150,000 to be divided among those attorneys-general in payment for expenses claimed to have been incurred

by them in connection with the subject matter of their litigation.

Any award of attorneys' fees in this litigation will ultimately be determined by the Court, and will not reduce or otherwise affect the amount being offered by General Motors to persons who choose to accept the Settlement Offer. In this regard, in six of the seven cases pending before this Court in which the class plaintiffs and their counsel have approved the Settlement Offer, General Motors has agreed not to object to petitions for attorneys' fees of no more than $60,000 for each case provided such petitions are supported by appropriate representations of counsel with respect to the work performed by them.

Some class plaintiffs and their counsel in this litigation object to the Offer of Settlement and contend that the consideration being offered by General Motors is neither fair nor adequate. These plaintiffs appealed the original preliminary approval of the settlement by this Court on behalf of the entire class. The United States Court of Appeals for the Seventh Circuit has reviewed the settlement offer and reversed the approval of the settlement as mandatory for the entire class. The Court of Appeals did, however, permit this Court to allow individual class members to decide for themselves whether they wish to accept the settlement offer and thus end their participation in this and other litigation or whether they wish instead to continue to be part of this class action.

As previously indicated in this Notice, you should clearly understand that, in permitting this Settlement Offer to be communicated, the Court expresses no opinion and makes no finding that the settlement is, or is not, fair and adequate consideration for a Release of eligible purchasers' claims. Nor does the Court express any opinion that you either should or should not accept this Offer of Settlement. The purpose of this Notice is merely to communicate the Offer of Settlement to you and allow you to make your own decision as to whether to accept or reject it.

In the event you wish to know more about the settlement agreement between the state attorneys-general and General Motors, you may inspect a copy of it which is on file at the Clerk's Office, at the address given below. The terms and conditions of this Offer of Settlement are governed by that agreement.

Separate Views of Plaintiffs
Who Object to this Settlement

Plaintiffs in some of the cases pending before this Court strongly object to the settlement offer as being inadequate to fairly compensate you for the claims which you are asked to relinquish. They believe that, if you reject the offer, you may recover an amount substantially higher than the amount of money offered to you as part of the settlement, and are asserting your right to return the car and receive the purchase price less a deduction for us.

Separate Views of Parties
Approving of this Settlement

Plaintiffs in some of the cases pending before this Court and the state attorneys-general who concluded the Settlement Agreement with General Motors, support the Settlement Offer and believe it to be a fair and reasonable offer for purposes of settlement. General Motors also supports the settlement offer as fair and reasonable, although in its view plaintiffs and class members are not entitled to any recovery in this litigation.

Inquiries

If you have any questions regarding this notice, you may address them to the persons listed below without any charge to you.

H. Stuart Cunningham
Clerk of the United States District Court
For the Northern District of Illinois,
219 South Dearborn Street
Chicago, Illinois 60604

Charles A. "Pat" Boyle
Scheele, Serkland & Boyle, Ltd.
77 West Washington Street
Chicago, Illinois 60602
(312) 368-1060
(Attorney for Plaintiffs Objecting to Settlement)

Donald G. Mulack
Special Assistant Attorney General of Illinois
℅ Michael A. Benedetto, Jr.
228 North LaSalle Street
Chicago, Illinois 60601
(312) 793-3444 or 3446
(Attorney for Plaintiffs Approving of Settlement)

You may also wish to consult with any attorney of your own choosing.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS
By .....
H. Stuart Cunningham
Clerk of the Court

Dated: July 5, 1979.

EXHIBIT D

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

Name of Presiding Judge, Honorable Frank J. McGarr
Cause No. M.D.L. Docket No. 308
Date July 5, 1979
Title of Cause
In Re General Motors Corporation
Engine Interchange Litigation
Brief Statement of Motion
Motion for Entry of Order Approving Notice of Offer to Settle Claims
The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).
Names and Addresses of moving counsel
Thomas A. Gottschalk, Stephen C. Neal, James D. Adducci, Kirkland & Ellis, 200 E. Randolph Dr., Chicago, Il. 60601
Representing
General Motors Corporation
Name and Addresses of other counsel entitled to notice and names of parties they represent
See attached list.
(Received July 16, 1979 Charles A. Boyle)
Docketed July 6, 1979
Reserve space below for notations by minute clerk
Status hearing held. Enter order approving notice of offer to settle claims as modified. Oral motion of certain plaintiffs to include opinion of U.S.C.A., 7th Circuit in notice is denied. Oral motion of defendant to file its memorandum on summary judgment on July 6, 1979 is granted. Status hearing is continued to Sept. 21, 1979 at 2:00 p.m.
Hand this memorandum to the Clerk.
Counsel will not rise to address the Court until motion has been called.
McGarr, J.

EXHIBIT E

RELEASE

In consideration of the payment to me of $200.00 by General Motors Corporation, I do hereby release and forever discharge General Motors Corporation, its subsidiaries, affiliates, directors, officers, employes, agents, successors, and franchised dealers from any and all claims which I may have against any or all of them based upon, arising out of, or relating to, the installation, incorporation, or use in any 1977 model automobile produced, manufactured, assembled, advertised, merchandised, or sold by General Motors Corporation or any of its franchised dealers of any engine, component, part, or assembly produced, manufactured, or assembled by any division or subsidiary of General Motors Corporation, or any supplier to General Motors Corporation, other than the division of General Motors Corporation which marketed or sold such automobile.

I understand that this payment is a compromise of a disputed claim, and that the payment is not to be construed as an admission of liability on the part of any persons, firms, organizations or corporations hereby released, by each of whom liability is expressly denied.

Nothing in this RELEASE shall be construed as a release, waiver, or discharge of any claims the undersigned now has, or hereafter may have, against General Motors Corporation and/or any of its franchised dealers arising out of any defect in design, material, or workmanship of any kind in any automobile produced, manufactured, assembled, advertised, merchandised, or sold by General Motors Corporation and/or any of its franchised dealers.

IN WITNESS WHEREOF, I ..... (print owner's name), have executed this RELEASE this ..... day of ....., 1978.

.....	.....
Witness	Signature of Owner
.....	.....
Witness	
	.....
	Address of Owner

EXHIBIT F

(Received July 5, 1979—Charles A. Boyle)

NUMBER 6893

COURT OF APPEAL, THIRD CIRCUIT
STATE OF LOUISIANA

JAMES F. GOUR

Plaintiff-Appellee

versus

DARAY MOTOR CO., INC. AND GENERAL MOTORS, INC.

Defendants-Appellants

Appeal from the Tenth Judicial District Court for the Parish of Natchitoches, State of Louisiana, Honorable Richard B. Williams, Judge, presiding.

Before: CULPEPPER, FORET, and DOUCET, Judges.

DOUCET, Judge.

This is an action for the annulment of a sale of an automobile and for damages. Plaintiff is the purchaser of the automobile; defendants are its manufacturer and the dealership through which it was sold. Both defendants have appealed from a judgment of the trial court, annulling the sale and awarding attorney's fees to plaintiff. For reasons which will follow, we affirm.

On February 17, 1977, plaintiff, James F. Gour, purchased a 1977 Oldsmobile Delta 83 Royale from Daray Motor Co., Inc. (hereinafter referred to as "Daray"). The total price of the sale was $8,122.65, which plaintiff satisfied by trading in a 1974 Oldsmobile and paying the balance in cash. The car had been manufactured primarily by the Oldsmobile Division of General Motors Corporation (hereinafter referred to as "General Motors"), however, the engine had been manufactured by General Motors' Chevrolet Division. The engine, designated by General Motors as an LM1 engine, had been substituted for the similar L34 engine, manufactured by Oldsmobile. The present controversy is the result of that substitution.

Plaintiff describes himself as an "Oldsmobile man", having a fondness for and familiarity with that particular make, which has developed over a period of twenty years. During that time, he has owned six other Oldsmobiles, similar to the one he purchased from Daray. Mr. Gour is

employed as a district manager for an insurance company, which requires him to drive extensively. He has come to depend on and trust Oldsmobiles to meet his driving needs. He alleges that he was unaware of the substitution of engines at the time he bought the car and that he would not have done so, had he known.

In support of that allegation, plaintiff established that there was nothing on the car or in the documents that he viewed at the time of the sale that indicated to him the true source of the car's engine. The sales invoice contained only the notation, "Engine, 350 V-8 4BBL." Although the window sticker bore General Motors' code name, LM1, its meaning was unknown to plaintiff. Furthermore, the engine's air cleaner bore an eye-catching, red and black on silver decal, which read, "Oldsmobile 350".

Defendants challenge that denial of knowledge. Mr. Tom Elkins, a salesman for Daray, testified at the trial that he recalled saying to plaintiff, as he showed him the car, "Mr. Gour, we have a 350 4-barrel engine in here, a Chevrolet engine". However, he further testified that at the time that comment was made, plaintiff was busily checking the various options on the car. Mr. Gour denied having heard such a statement by Mr. Elkins. The trial court apparently found that although the statement was actually made, Mr. Gour either did not hear it or did not grasp the import of what was said. It concluded that the knowledge of the source of the engine had not been effectively communicated to plaintiff.

The trial court held that the sale was invalid, because plaintiff's consent had been produced by error, the error being his belief that the engine had been manufactured by Oldsmobile. Although plaintiff sought damages for inconvenience caused by the allegedly poor performance of the car and for mental distress, the trial court found that he was not entitled to such damages. However, it ordered that the entire purchase price be returned to plaintiff, upon his surrendering possession and title of the car, without allowing a credit for plaintiff's use of it. It also awarded plaintiff $2,000 in attorney's fees. Both Daray and General Motors were declared bound in solido under the judgment. The court concluded that although the two

were separate legal entities, General Motors retained substantial control over Daray's actions in selling the automobiles it manufactured, and its responsibility was, therefore, parallel to Daray's.

The issues before this court are, essentially, whether or not the trial court was correct in (1) holding that the sale was invalid, (2) finding General Motors liable in solido with Daray, (3) awarding plaintiff attorney's fees, and (4) refusing to allow defendants a credit for plaintiff's use of the car.

1.

As with any other type of contract, it is essential to a contract of sale that the consent of the parties be legally given.[1] Under the proper circumstances, the consent of the parties may be vitiated by error.[2] The error complained

[1] *LSA-Civil Code Article 1779*

Art. 1779. Four requisites are necessary to the validity of a contract:

1. Parties legally capable of contracting.
2. Their consent legally given.
3. A certain object, which forms the matter of the agreement.
4. A lawful purpose.

[2] *LSA-Civil Code Article 1819*

Art. 1819. Consent being the concurrence of intention in two or more persons, with regard to a matter understood by all. reciprocally communicated, and resulting in each party from a free and deliberate exercise of the will, it follows that there is no consent, not only where the intent has not been mutually communicated or implied, as is provided in the preceding paragraph, but also where it has been produced by—

Error;

Fraud;

Violence;

Threats.

LSA-Civil Code Article 1823

Art. 1823. Errors may exist as to all the circumstances and facts which relate to a contract, but it is not every error that will invalidate it. To have that effect, the error must be in some point, which was the principal cause for making the contract, and it may be either as to the motive for making the contract, to the person with whom it is made, or to the subject matter of the contract itself.

of by plaintiff in this case is an error of fact, relating to a quality of the object of the contract, other than the principal one.[3] Therefore, the quality of the object sought by plaintiff, an engine manufactured by Oldsmobile, must have been a principal cause for his having entered into the contract. This principal cause, or motive, must have been communicated to the other party, unless it can be presumed from the circumstances that the other party knew of it.[4]

Defendants argue, initially, that there was no error, plaintiff having been informed by Mr. Elkins of the origin of the engine. As we noted earlier, the trial court found

[3] *LSA-Civil Code Article 1820*

Article 1820. Error, as applied to contracts, is of two kinds:

1. Error of fact;
2. Error of law; [.]

LSA-Civil Code Article 1821

Art. 1821. That is called error of fact, which proceeds either from ignorance of that which really exists, or from a mistaken belief in the existence of that which has none.

LSA-Civil Code Article 1844

Art. 1844. The error bears on the substantial quality of the object, when such quality is that which gives it its greatest value. A contract relative to a vase, supposed to be gold, is void, if it be only plated with that metal.

LSA-Civil Code Article 1845

Art. 1845. Error as to the other qualities of the object of the contract, only invalidates it, when those qualities are such as were the principal cause of making the contract.

[4] *LSA-Civil Code Article 1825*

Art. 1825. The error in cause of a contract to have the effect of invalidating it, must be on the principal cause, when there are several; this principal cause is called the *motive,* and means that consideration without which the contract would not have been made.

LSA-Civil Code Article 1826

Art. 1826. No error in the motive can invalidate a contract, unless the other party was appraised that it was the principal cause of the agreement, or unless from the nature of the transaction it must be presumed that he knew it.

as a fact that that information had not been effectively communicated. Given the court's reasonable evaluation of the credibility of the witnesses, we believe that the evidence as a whole supports its conclusion. Since we cannot say that the trial court was manifestly erroneous, that finding will not be disturbed. *Arceneaux* v. *Domingue*, 365 So.2d 1330 (La. 1978).

The question that remains to be answered is a two-fold one. First, would plaintiff have purchased the car, if he had known that it contained an engine that had not been manufactured by Oldsmobile? Second, can it be presumed that the seller knew of that fact? We believe that the first question must be answered in the negative and the second in the affirmative.

In view of the fact that plaintiff shopped for and purchased an Oldsmobile, rather than a Chevrolet or any other make, we find his claim that he desired an engine produced by Oldsmobile entirely reasonable. The engine, while perhaps not the single most important part of a car, is certainly one of its most major components. Equally reasonable is plaintiff's argument that the seller should be presumed to have known of his preference. The facts of this case are similar to those encountered by the court in *Ouachita Air Conditioning, Inc.* v. *Pierce*, 270 So.2d 595 (La. App. 2nd Cir. 1972). In that case, defendant had contracted with plaintiff to repair the York air conditioning system in his home. With defendant's consent, plaintiff replaced two compressors, major components of the system. However, unknown to defendant, plaintiff installed compressors produced by Amana, rather than York. The court concluded:

> "We are convinced that this case falls squarely under LSA-Civil Code Article 1845, in that there was error of fact as to the manufacturer of the unit, and that this quality was a principal cause of making the contract from defendant's standpoint. While the seller did not have actual knowledge that this was a principal cause or motive it should be presumed that he knew it from the nature of the transaction and, therefore, the test of Article 1826 is met. Although Lawler was in good faith, when he was confronted with a complete York system in which a major component needed replacing he should have been aware that without anything being said to the contrary, the buyer would expect replacement with the same brand of unit. The trial court was correct in setting aside the sale and rejecting plaintiff's demands."

General Motors would distinguish this case essentially on the basis of the fact that the manufacturer of the unit did not approve the specifications for or warrant the replacement parts. However, while it is reasonable to assume that the warranties and quality approval of the manufacturer play a part in the purchaser's choice of a product, it would be unwarranted to assume that it is the only consideration, or even that it is necessarily the primary one.

We believe that it can and should be presumed from the circumstances of this case that the seller knew that plaintiff's desire to obtain an Oldsmobile with an Oldsmobile engine was the principal cause of his entering into the contract of sale. We further believe that our conclusion is supported by the actions taken by both defendants in effecting their common purpose of selling cars. General Motors carefully concealed the source of the engine from the buying public by identifying it only with a code, which an unaided purchaser could not understand. Daray's salesman was aware of the meaning of that code and of the fact that the car contained a Chevrolet engine. However, while he apparently considered it a fact worthy of mention, only a passing comment was made, and it was made at a time when the buyer was obviously distracted.

Although the above adequately resolves the issue of the recission of the sale, we prefer to base our decision to affirm on another provision of our law, which is more directly aimed at redressing the kind of consumer complaint made by plaintiff, and which provides for more comprehensive relief. We are referring to LSA-R.S. 51:1401, et

seq., the Unfair Trade Practices and Consumer Protection Law.[5]

In broad language, LSA-R.S. 51:1405(A) declares that:

> "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful."

The terms "trade" and "commerce" are defined by §1402(10) as:

> "[T]he advertising, offering for sale, sale or distribution of any services and any property, corporeal or incorporeal, immovable or movable, and any other article, commodity or thing of value wherever situated, and includes any trade or commerce directly or indirectly affecting the people of this state."

It is apparent from these provisions that the business activities of General Motors and Daray are within the purview of this act, and that they are subject to the sanctions provided for therein, for any of those activities found to be in violation of the act. We believe that there has been such a violation in this case.

General Motors, on the other hand, argues that its actions, which plaintiff complains of, are exempt from the provisions of the Unfair Trade Practices and Consumer Protection Law, relying on LSA-R.S. 51:1406, which provides in part:

---

[5] The history, purpose and general provisions of this act were recently discussed by our Supreme Court in its opinion on rehearing in *State ex rel. Guste* v. *General Motors Corporation,* ..... So.2d ..... (La. 1979), docket no. 61840, decided April 9, 1979. That case is a class action, brought by the Attorney General in behalf of all plaintiffs aggrieved in the same manner as the plaintiff in this case. It does not preclude us from granting the individual relief sought by plaintiff, however. The court specifically recognized the right of affected consumers, who wished to control their own litigation, to withdraw from the class action. We are of the opinion that Mr. Gour opted out of the class action in this case by filing this separate suit. See *Williams* v. *State,* 350 So.2d 131 (La. 1977).

> "The provisions of this chapter shall not apply to: (4) Any conduct which complies with section 5(a)(1) of the Federal Trade Commission Act [15 U.S.C., 45(a)(1)], as from time to time amended, any rule or regulation promulgated thereunder and any finally adjudicated court decision interpreting the provisions of said Act, rules and regulations."

It argues that its conduct complies with and is sanctioned by the Federal Trade Commission Act, citing *In The Matter of General Motors Corp.,* 53 F.T.C. 1239 (1957).

The latter action was initiated by the Federal Trade Commission, which charged General Motors with committing a fraudulent and deceptive trade practice. The activity complained of was General Motors' advertising automotive replacement parts as "Genuine Chevrolet Parts", when they were manufactured by outside vendors, rather than by any division of General Motors. That advertising was alleged to be false and deceptive. After a hearing on the matter, the F.T.C. dismissed the complaint, holding that the parts were as much genuine parts as those made in General Motors' own plant, because they were made according to its specifications and tested, approved and warranted by it.

We see a great deal of difference between replacement parts, used for maintenance purposes, and a major component part of a new car, such as the engine. Our view is apparently shared by the F.T.C., which has brought another complaint against General Motors, based in part on its substitution of engines in the manner complained of in the present case. See *In The Matter of General Motors Corp.,* ..... F.T.C. ....., No. 772-3031, decided June 21, 1978. In response to that complaint, General Motors has entered into an agreement containing a consent order to cease and desist, among other things, misrepresenting the manufacturing source of any engine option. Under the order, General Motors is specifically prohibited from displaying the name of a particular General Motors division on the air filter cover of the engine, unless the engine was manufactured by that division. While the latter

agreement provides that it is not an admission by General Motors that the law has been violated, we believe that the complaint, together with the agreement, casts considerable doubt on General Motors' assertion that its activities are sanctioned by the Federal Trade Commission Act.

That doubt is further reinforced by the opinion of the court in *In Re General Motors Corporation Engine Interchange Litigation* v. *General Motors Corporation,* ..... F.2d ..... (7th Cir. 1979), docket no. 78-2036, decided February 26, 1979. The posture of that case was similar to that in *State ex rel. Guste* v. *General Motors Corporation,* ..... So.2d ..... (La. 1979), docket no. 61840, decided April 9, 1979, in that the issue was procedural, and the court, therefore, did not rule definitely on the merits of the case. The issue was the propriety of a subclass settlement in a federal class action. The class action was founded on consumer complaints about the substitution of engines as in this case. In considering the fairness of the settlement, the court found it necessary to examine the strength of the plaintiffs' case against General Motors. At footnote 44 of the court's opinion, it stated:

> "We think the objectors presented substantial evidence tending to show that GM deliberately concealed the source of the engines in the cars that it sold as Oldsmobiles and that it did so to increase profits."

The court's discussion as a whole strongly suggests to us that the activities in question are in violation of the Federal Trade Commission Act and other federal laws.

That conclusion is not surprising in view of the fact that the federal courts have consistently condemned trade activities calculated to deceive the buying public. For example, see the court's opinion in *Alfred Dunhill Ltd.* v. *Interstate Cigar Co.,* 449 F.2d 232 (2nd Cir. 1974), in which it said:

> "The courts have agreed with the Commission's interpretation of the Commission's power under the Federal Trade Act and have typically held that:

> '[F]ailure to disclose or mark or label material facts concerning merchandise, which, if known to prospective purchasers, would influence their decisions of whether or not to purchase, is an unfair trade practice violative of §5 of the Federal Trade Commission Act, Haskelite Manufacturing Corp. v. Federal Trade Commission, 7 Cir., 127 F.2d 765, . . .'
>
> L. Heller & Son v. Federal Trade Commission, 191 F.2d 954, 956 (7th Cir. 1951). See also Ward Laboratories, Inc. v. Federal Trade Commission, 276 F.2d 952 (2d Cir. 1960)."

We find General Motors' argument that its activities are sanctioned by federal law untenable, when balanced against the weight of these authorities.

In considering the question of what constitutes a violation of LSA-R.S. 51:1405(A), the court in *Guste* v. *Demars,* 330 So.2d 123 (La. App. 1st Cir. 1976), said the following:

> "The substantive prohibition of the Unfair Trade Practices and Consumer Protection Law is broad and does not specify particular violations. . . . The language of this section tracks closely that of the Federal statute, 15 U.S.C. Section 45(a). Because of the variety of possible unfair and deceptive practices, the Federal statute was intentionally broadly written, leaving the determination of individual violations to the Commission and the courts. Our legislature has expressed a similar intention in patterning our law so closely on the Federal statute. Therefore, we may and should consider interpretations of the Federal courts and of the Commission relative to such similar statutes to adjudge the scope and application of our own statute. State, through Dept. of Highways v. Braddock, 170 So.2d 5 (La. App. 1st Cir. 1964)."

We agree that the federal authorities set out above are proper sources for guidance in deciding whether or not there has been an infraction of our law.

We do not base our conclusion that there has been a violation of the Unfair Trade Practices and Consumer

Protection Law on a determination that federal law has been transgressed, however. We do not find it necessary to do so, because we believe that the conduct of the defendants in this case is of the kind that our own legislature has declared unlawful. General Motors deliberately took measures, such as putting the decal on the air cleaner, which were calculated to lead plaintiff to believe that he was purchasing a car that contained an Oldsmobile engine. Daray became a party to that misrepresentation when it failed to adequately disclose the true source of the engine, and it profited from the deception, as well. Therefore, we hold that there has been a violation of LSA-R.S. 51:1405 (A).

LSA-R.S. 51:1409(A) provides that any person, who suffers a loss of money or movable property as a result of a practice violative of 1405(A) may bring a private action, individually, but not in a representative capacity, to recover "actual damages". Recently, our supreme court in *State ex rel. Guste* v. *General Motors Corporation,* supra, upheld a decision of the Fourth Circuit in which the term "actual damages" was interpreted to mean "relief other than the refund of the purchase price and the return of the status quo that constitutes restitution". As noted earlier, that case was concerned with a class action brought by the Attorney General. The court held that such an action is permissible, provided that it is limited to restitutionary recovery, in view of the prohibition contained in §1409(A).

Justice Marcus points out in his dissenting opinion that the majority's interpretation could lead to the conclusion that §1409(A) allows a private action for the recovery of other damages, but precludes recovery in restitution. We agree with him that the legislature did not intend such a result. Moreover, we do not believe that such a result must necessarily follow from the position taken by the majority.

It can be argued that because the legislature specifically provided for the recovery of actual damages in a private action, it intended to prohibit all other types of recovery.

However, that argument ignores the fact that in enacting §1409(A), the legislature included a rather strong incentive for injured consumers to invoke private litigation. It provides for the recovery of treble damages, if an unfair or deceptive practice is used after the offending party is put on notice by the director of the Governor's Consumer Protection Division or the Attorney General. It also provides for the recovery of reasonable attorney's fees and costs incurred in bringing a private action. That incentive would be greatly diminished if the plaintiff was prohibited from seeking restitution.

As the majority of our supreme court noted, a class action may be of great utility to injured consumers, even though their individual recovery is limited to restitution. A legislative intent to provide for such an action is understandable. The same cannot be said, however, of a private action in which the plaintiff is prohibited from recovering for what may be the major portion of his loss. We believe that it was the intent of the legislature to allow restitutionary recovery as well as the recovery of other damages under LSA-R.S. 51:1409(A) and that plaintiff in this case is entitled to the return of the purchase price.

2.

General Motors correctly argues that the trial court erred in holding it solidarily liable with Daray on the basis of its supposed control over the actions of Daray. There is no evidence, whatsoever, in the record to support such a conclusion. However, we have determined that General Motors is guilty of activities which are unfair and deceptive trade practices within the meaning of LSA-R.S. 51:1405(A). Those practices combined with Daray's failure to disclose the origin of the engine to produce the injury of which plaintiff complains. General Motors is, therefore, equally responsible for producing the harm that was done.

Under these circumstances, we can see no difference between the positions of the defendants and those of point tort-feasors under LSA-Civil Code Article 2315, nor can

we see any reason why they should be treated differently. Under our law, joint tort-feasors are solidarily liable. LSA-Civil Code Articles 2103, 2324; *Mullin* v. *Skains,* 252 La. 1009, 215 So.2d 643 (1968); *Cavalier* v. *City of New Orleans,* 273 So.2d 303 (La. App. 4th Cir. 1973), writ denied, 275 So.2d 781 (La. 1973). Therefore, we hold that General Motors is liable in solido with Daray.

3.

Since we have found that defendants have violated the Unfair Trade Practices and Consumer Protection Law, we find it unnecessary to discuss the numberous arguments raised by defendants on the issue of attorney's fees. LSA-R.S. 51:1409(A) provides that reasonable attorney's fees shall be awarded in the event that damages are awarded under that section. In view of the complex nature of this litigation and the amount of time spent by plaintiff's attorney in court, the award of $2,000 is certainly not unreasonably high.

Plaintiff's attorney has asked by way of a reply brief filed on February 16, 1979 that the award for attorney's fees be increased to $3,500. LSA-C.C.P. Art. 2133 provides that if an appellee desires to have a judgment modified or revised, he must file an answer to the appeal, stating the relief demanded, not later than fifteen days after the return day or the lodging of the record, whichever is later. The later date in this case was the lodging of the record, which occurred on October 11, 1978. Accordingly, even if plaintiff's request could be construed as an answer to the appeal, it obviously was not timely filed. Since this procedural requirement has not been met, we are not at liberty to grant the increase prayed for, despite the obvious merit of that request under the facts.

4.

By the time of the trial, plaintiff had had the possession and use of the 1977 Oldsmobile for fourteen and one-half months. During that time, the car was driven approximately 17,000 miles. Defendants argue that they should be given a credit for that use. It was stipulated that the

rental value of the car was $179.00 per month. Thus, the amount sought in credit is $2,595.50.

We agree that defendants must be allowed a credit for plaintiff's use of the car. As this court said in *Nugent* v. *Stanley,* 336 So.2d 1058 (La. App. 3rd Cir. 1976),

> "When a sale is rescinded the parties are returned as nearly as possible to the situation as it existed prior to the sale. The vendee returns the property to the vendor and the vendor returns the purchase price subject to whatever adjustments are necessary for his use of the property during the period he possessed same. Jones v. Deloach, 317 So.2d 240 (La. App. 2nd Cir. 1975)."

True restitution cannot be achieved in a case such as this without allowing for the buyer's use of the car.

We cannot agree with the method of computing the credit proposed by defendants, however. $179.00 per month represents the amount that a bona fide lessee would have been charged for the use of the car. Presumably a profit would have been made on such a transaction. Under the circumstances of this case, defendants are not entitled to profit from plaintiff's use of the car. Recently, in the case of *Robertson* v. *Jimmy Walker Chrysler-Plymouth,* 368 So.2d 747 (La. App. 3rd Cir. 1979), writs denied June 1, 1979, which also involved the dissolution of a sale of an automobile, we held that $.08 per mile was a proper credit to be allowed against the purchase price for the buyer's use of the car. Applying that method of computation to the present case, we have determined that defendants are entitled to a credit of $1,360 for the 17,000 miles that the car had been driven.

For the reasons set forth herein, the judgment of the trial court is amended to allow defendants, Daray Motor Co., Inc. and General Motors Corporation a credit in the amount of $1,360. In all other respects the judgment of the trial court is affirmed. All costs of this appeal are assessed against defendants.

AMENDED AND AFFIRMED.

EXHIBIT G

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
July 26, 1979

Before
Hon. THOMAS E. FAIRCHILD, Chief Judge
Hon. LUTHER M. SWYGERT, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge

No. 79-1819
BETTY OSWALD, EILEEN MILLER, PHIL MILLER
and MICHAEL BALOG, on behalf
of themselves and all other similarly situated,
Petitioners,

vs.

FRANK J. McGARR, U.S. District Judge,
Northern District of Illinois,
Respondent.

No. 79-1843
IN RE GENERAL MOTORS CORPORATION
ENGINE INTERCHANGE LITIGATION,

vs.

APPEAL OF: BETTY OSWALD, on her behalf and on behalf of all others similarly situated, et al.

Appeals from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. MDL 308
FRANK J. McGARR, *Judge.*

This matter comes before the court for its consideration upon the filing of the following documents:

1. The "MOTION TO STAY TRANSMITTAL OF THE OFFER OF SETTLEMENT" filed herein on July 26, 1979, by counsel for the plaintiffs.

2. The "RESPONSE OF PLAINTIFF-PROPONENT STATE OF ILLINOIS TO PLAINTIFFS-OBJECTORS MOTION TO STAY TRANSMITTAL OF THE OFFER OF SETTLEMENT" filed herein on July 26, 1979, by counsel for plaintiff-proponent.
3. The "OPPOSITION OF GENERAL MOTORS CORPORATION TO MOTION TO STAY TRANSMITTAL OF THE OFFER OF SETTLEMENT" filed herein on July 26, 1979, by counsel for the respondent, General Motors Corporation.
4. The "MEMORANDUM IN SUPPORT OF PLAINTIFF-OBJECTORS MOTION TO STAY TRANSMITTAL OF THE OFFER OF SETTLEMENT" filed herein on July 26, 1979, by counsel for plaintiffs-appellants.
5. The "PETITION FOR WRIT OF MANDAMUS" filed herein on July 26, 1979, by counsel for the petitioners.

Pending resolution of the jurisdictional and merits issues in the above entitled proceedings, the mailing of the "Notice of Offer to Settle Claims" is hereby stayed and enjoined, except that the stay and injunction may be terminated if the notice is modified so as:

1. To include an express statement that "This offer can be accepted by any eligible individual without regard to acceptance or rejection by other eligible individuals. If you accept the offer, you will be bound by your acceptance whether others do or do not accept."
2. To include in one or more appropriate places an express statement that "An example of the type of claim which was not before the district court in this lawsuit, but which you will release by accepting this offer, is a claim for substitution of any other power train components." Appropriate places for

this or a similar statement appear to be: (a) at the bottom of page 3; (b) at the bottom of page 5; and (c) at the top of page 7.

We leave the approval of the exact wording and the choice of location to the district court, and upon approval of the district court, this stay and injunction shall terminate without further order of this court, whether or not the above entitled proceedings, or either of them, remain pending.

IT IS ALSO ORDERED that the consideration of the "Petition for Writ of Mandamus" filed on July 23, 1979, and docketed in Appeal No. 79-1819 is hereby consolidated with the appeal docketed in 79-1843. Respondents shall file a response to the "Petition for Writ of Mandamus" on or before August 16, 1979.

EXHIBIT H

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MDL DOCKET NO. 308

IN RE GENERAL MOTORS CORPORATION
ENGINE INTERCHANGE LITIGATION

NOTICE OF OFFER TO SETTLE CLAIMS

This Notice is directed to each original owner (other than General Motors franchised dealers) of a 1977 model Oldsmobile who satisfies both of the following two conditions.

1. The owner must have entered into a written purchase contract, dated on or before April 10, 1977, with a General Motors franchised dealer or his representative for a new and unused 1977 Oldsmobile; and,

2. Such 1977 Oldsmobile must have been delivered to the owner equipped with a V-8 engine produced in a General Motors plant operated by the Chevrolet Motor Division of General Motors.

If you meet both of these conditions, you should carefully read this Notice in its entirety, and make sure you understand it before taking any action based upon it. If you do not meet both conditions, this Notice is not directed to you, and you should disregard it.

OFFER TO SETTLE CLAIMS

This Notice communicates an Offer of Settlement of $200 and transferable mechanical insurance coverage, as described below, which is being made by General Motors Corporation, a defendant in this and other litigation concerning 1977 Oldsmobiles equipped with Chevrolet produced V-8 engines. If you meet both conditions above, then you are eligible to consider the Offer of Settlement.

This Notice describes the Settlement being offered, the claims being asserted against General Motors and the effects on your rights of either accepting or rejecting the Offer of Settlement. You may have received an earlier notice from the Clerk of the Court dated March 16, 1978. The description of the Settlement Offer and the effects of accepting it are as set forth in this Notice, and you should disregard the description provided in the earlier notice.

In allowing this Notice to be communicated, the Court does not indicate any opinion or finding that the Settlement described below is fair or adequate. Nor does the Court express any opinion that you should either accept or reject this Offer of Settlement. [This offer can be accepted by an eligible individual without regard to acceptance or rejection by other eligible individuals. If you accept the offer, you will be bound by your acceptance whether others do or do not accept.]

DESCRIPTION OF THIS LITIGATION

In this class action litigation, plaintiffs are alleging, on behalf of themselves and the class they represent, that General Motors violated the Magnuson-Moss Warranty Act, a federal statute, by failing to disclose that the 1977 model Oldsmobiles which they purchased were equipped with V-8 engines produced in General Motors plants operated by its Chevrolet Motor Division. Plaintiffs allege that there is a difference in the quality and value of the Chevrolet and Oldsmobile engines. Plaintiffs are seeking both compensatory and punitive damages, as well as rescission and other equitable relief including replacement of the engines. They also are seeking attorneys' fees and costs incurred in the litigation.

General Motors denies plaintiffs' allegations and asserts that the Chevrolet engines were comparable to the Oldsmobile engines in all material respects and they met General Motors' engineering standards, and further that its conduct has been lawful in all respects. General Motors has asked that the actions be dismissed and that plaintiffs and class members recover nothing.

The only issues before the Court raised by complaints and certified by the Court for the class action pertain to the alleged substitution of engines. No trial has been conducted, and the Court has made no decision concerning the claims of the plaintiffs. Therefore, this Notice should not be interpreted as an opinion of any kind about the validity of any of the claims or defenses being asserted in this litigation.

Plaintiffs also contend that General Motors substituted other power train components, including transmissions and rear drive axles, in place of components allegedly warranted as being standard equipment on those Oldsmobiles. Claims relating to other components including transmissions and rear drive axles are not pending before this Court for adjudication in this litigation. [An example of the type of claim which was not before the district court in this lawsuit, but which you will release by accepting this offer, is a claim for substitution of any other power train components.]

TERMS OF OFFER TO SETTLE

In return for a Release of claims, General Motors offers you a cash payment of $200 and, if eligible, transferable mechanical insurance coverage, as explained below.

Cash Payment

General Motors offers to you, as an eligible original owner of a 1977 Oldsmobile, the total sum of $200.00.

Transferable Mechanical Insurance Coverage

If you still own your eligible 1977 Oldsmobile described above, General Motors also offers you transferable mechanical insurance coverage in the form of a special Mechanical Performance Certificate underwritten by Motors Insurance Corporation covering the power train (engine, transmission, and drive axle) of your 1977 Oldsmobile automobile for 36 months or 36,000 miles from the date of original delivery of that automobile to you, whichever occurs first. Many of you already have received free from

General Motors a non-transferable version of the Special Mechanical Performance Certificate which otherwise offers identical coverage.

If you no longer own your eligible 1977 Oldsmobile described above, General Motors also offers you the transferable mechanical insurance coverage on any one 1977 model General Motors passenger automobile of which you are still the original owner. The mechanical insurance coverage commences from the date of delivery of the insured automobile to you. If you do not still own the eligible 1977 Oldsmobile or another eligible 1977 General Motors passenger automobile as described above, you will not receive the insurance coverage and certificate.

Some of you who are eligible to receive the insurance certificate may previously have purchased a mechanical insurance policy or mechanical service contract covering your 1977 Oldsmobile or other eligible 1977 General Motors automobile which may still be in effect. The protection offered under those policies or contracts may be different from the protection afforded by the Special Mechanical Performance Certificate offered as part of this Settlement. The protection afforded by each policy or contract must be determined by reference to its particular terms and conditions. Similarly, in the event there are questions about any cancellation or refund rights relating to such policy or contract, such rights are determined by reference to the terms of the particular policy or contract.

The Release

In return for the above described cash payment and, if eligible, insurance certificate, each of you who wishes to accept the offer must sign a Release of claims. The Release you will be required to sign should you choose to accept this Offer of Settlement is enclosed with this Notice. *Once signed, the Release will significantly and finally affect your legal rights. You should note that the release covers claims which are not pending before the Court in this litigation, as well as claims which are before the Court. You should therefore read the Release, and the discussion of*

the Release which follows, very carefully. [An example of the type of claim which was not before the district court in this lawsuit, but which you will release by accepting this offer, is a claim for substitution of any other power train components.]

EFFECTS OF SIGNING THE RELEASE

The Release will release General Motors, its subsidiaries, affiliates, directors, officers, employees, successors and its independent franchised dealers from any and all claims which you may have now or in the future based upon, arising out of, or relating to, the installation, incorporation, or use in any 1977 model automobile produced, manufactured, assembled, advertised, merchandised, or sold by General Motors or any of its franchised dealers of any engine, component, part, or assembly produced, manufactured, or assembled by any division or subsidiary of General Motors, or any supplier to General Motors other than the division of General Motors which marketed or sold such automobile.

If you choose to accept the Offer of Settlement, you will *not* be required to release any claims you now have or hereafter may have against General Motors or any of its dealers arising out of any defects in the design, material or workmanship of any kind in their automobiles.

The Release will permanently and forever bar you, if you accept the Offer of Settlement, from any future or further recovery for claims being asserted in this litigation, and your claims will be dismissed with prejudice by this Court. The Release will also permanently and forever bar you from suing or recovering on *all claims* covered by it, regardless of whether those claims arise under federal, state or common law and regardless of whether or not those claims are presently, or may later be, the subject of this or any other pending or future litigation brought by you or on your behalf. [An example of the type of claim which was not before the district court in this lawsuit, but which you will release by accepting this offer, is a claim for substitution of any other power train com-

ponents.] By accepting the Offer of Settlement and signing the Release, you will have no right whatsoever to participate in or receive part of a later recovery, if any, against General Motors or its dealers, whether by judgment, settlement or otherwise, and regardless of whether such recovery may be more favorable than this Offer of Settlement.

General Motors is currently aware of litigation pending in California, Connecticut, Florida, Louisiana, Minnesota, Missouri, New Jersey, Ohio, Oregon and Texas, in which the complaints filed with the courts include class action allegations on behalf of certain residents of those states who purchased 1977 Oldsmobile automobiles and received such automobiles equipped with V-8 engines produced in a plant operated by the Chevrolet Motor Division. The caption of the lawsuit that is pending in [state] is: [caption to be inserted in notices sent to residents of state in which action is pending.] By accepting the Offer of Settlement and signing the Release, you will have no right whatsoever to participate in or receive part of a later recovery, if any, against General Motors or its dealers in such state action.

The release will also affect other claims which are not pending before this Court. Other lawsuits have recently been filed against General Motors charging that it has violated the Magnuson-Moss Warranty Act and other laws by allegedly substituting a THM 200 transmission for THM 350 transmission in 1977 Oldsmobiles and other General Motors automobiles. There are currently three separate lawsuits of this nature and their captions are: *Skelton* v. *General Motors Corp.,* No. 79 C 1243, United States District Court for the Northern District of Illinois; *Haskins* v. *General Motors Corp.,* No. 79 CH 1949, Circuit Court of Cook County, Illinois; and *Leonard M. Groupe P.C.* v. *General Motors Corp.,* No. 79 CH 2260, Circuit Court of Cook County, Illinois. Each of these lawsuits claims to be brought as a class action. You may be one of the individuals within one or more of the alleged classes. There has been no judicial determination as to the merits of any

of those lawsuits or as to whether they are proper class actions. By accepting the Offer of Settlement and signing the Release, you will give up the right to assert, or to have asserted on your behalf, claims as described in the release regarding the transmission in your automobile, including some or all of the claims which may be asserted in the transmission lawsuits. In accepting the Offer of Settlement and signing the Release, you will *not* be required to release any claims you now have or hereafter may have against General Motors or any of its dealers arising out of any defects in the design, material, or workmanship of any kind in the transmission installed in your automobile.

HOW TO ACCEPT THE OFFER

If you decide to accept the Offer of Settlement, you must fill out the enclosed claim form and, on the reverse side, fill out and sign the Release. Once you have filled those out and returned them, a check in the amount of $200.00 will be mailed to you directly by General Motors. Provided you still own an eligible vehicle, you will also be sent the transferable insurance certificate. Upon your receipt of the check—and, if you are eligible, the certificate —the Settlement will be complete and the dismissal of claims in this action, as well as the Release of claims, as described above, will be fully and finally effective as to you.

To accept this offer, you must, within 60 days after you receive this letter, (1) complete the enclosed Claim Form, (2) complete and execute the Release which is on the back of the Claim Form, and, (3) return the Claim Form and Release to Oldsmobile Division, P.O. Box ....., Lansing, Michigan. A stamped pre-addressed envelope is enclosed for your convenience.

If there is more than one owner of the vehicle, all co-owners must sign the Release. If the owner of the vehicle is a corporation, the Release should so indicate and be appropriately acknowledged by an officer and his corporate title provided.

EFFECTS OF NOT ACCEPTING THE OFFER

If you do not accept the offer, no action by you is necessary. If you are a member of the class and you do not accept the offer, you will be bound by such future orders and dispositions as may be entered in this litigation, including any final judgment, regardless of whether they are favorable or adverse to you. Under normal circumstances, class members in cases of this type are not liable for costs of litigation.

Plaintiffs in this suit intend to pursue their claims and those of the class they represent. General Motors intends to defend this litigation and contests the Court's pretrial certification of it as a class action. This case may later be settled or may go to trial. If it goes to trial, the losing party may appeal. The Court makes no prediction as to how or when this litigation will be finally resolved. If plaintiffs prevail, you may recover a greater or lesser amount of money than is offered to you now and the plaintiffs may recover attorneys' fees and costs. If General Motors prevails, you will receive nothing from this litigation.

In addition, there are other lawsuits pending, and other suits may later be filed, against General Motors concerning the same or related claims and you may be a party to or a class member in one or more of them. If you are a party or a class member in such other lawsuit(s), the first suit to come to a final judgment may affect your rights to proceed with and to recover any judgment in any other suit, regardless of whether the other suit is based on the same or a different legal theory. If the judgment entered in the first suit to reach a final disposition is favorable and you are awarded money damages, you may be barred from recovering any additional award in the other suit(s). If the judgment entered in the first suit to reach a final disposition is adverse to you and you are not awarded any recovery, you may be barred from obtaining any recovery that may be awarded in the other suit(s).

ADDITIONAL BACKGROUND INFORMATION

The Offer of Settlement is part of a settlement agreement concluded between General Motors and 44 state attorneys-general on December 19, 1977. Those attorneys-general either had filed or were threatening to file suits against General Motors relating to the engines used in 1977 Oldsmobiles. Those attorneys-general agreed to dismiss (or not to file) their lawsuits and to support any request by General Motors in a class action suit to communicate the Settlement Offer to eligible owners. Subject to necessary court approvals, General Motors agreed to extend the Offer of Settlement to eligible owners and to pay $150,000 to be divided among those attorneys-general in payment for expenses claimed to have been incurred by them in connection with the subject matter of their litigation.

Any award of attorneys' fees in this litigation will ultimately be determined by the Court, and will not reduce or otherwise affect the amount being offered by General Motors to persons who choose to accept the Settlement Offer. In this regard, in six of the seven cases pending before this Court in which the class plaintiffs and their counsel have approved the Settlement Offer, General Motors has agreed not to object to petitions for attorneys' fees of no more than $60,000 for each case provided such petitions are supported by appropriate representations of counsel with respect to the work performed by them.

Some class plaintiffs and their counsel in this litigation object to the Offer of Settlement and contend that the consideration being offered by General Motors is neither fair nor adequate. These plaintiffs appealed the original preliminary approval of the settlement by this Court on behalf of the entire class. The United States Court of Appeals for the Seventh Circuit has reviewed the settlement offer and reversed the approval of the settlement as mandatory for the entire class. The Court of Appeals did, however, permit this Court to allow individual class members to decide for themselves whether they wish to accept the settlement offer and thus end their participation in this and other litigation or whether they wish instead to continue to be part of this class action.

As previously indicated in this Notice, you should clearly understand that, in permitting this Settlement Offer to be communicated, the Court expresses no opinion and makes no finding that the settlement is, or is not, fair and adequate consideration for a Release of eligible purchasers' claims. Nor does the Court express any opinion that you either should or should not accept this Offer of Settlement. The purpose of this Notice is merely to communicate the Offer of Settlement to you and allow you to make your own decision as to whether to accept or reject it.

In the event you wish to know more about the settlement agreement between the state attorneys-general and General Motors, you may inspect a copy of it which is on file at the Clerk's Office, at the address given below. The terms and conditions of this Offer of Settlement are governed by that agreement.

Separate Views of Plaintiffs
Who Object to this Settlement

Plaintiffs in some of the cases pending before this Court strongly object to the settlement offer as being inadequate to fairly compensate you for the claims which you are asked to relinquish. They believe that, if you reject the offer, you may recover an amount substantially higher than the amount of money offered to you as part of the settlement, and are asserting your right to return the car and receive the purchase price less a deduction for use.

Separate Views of Parties
Approving of this Settlement

Plaintiffs in some of the cases pending before this Court and the state attorneys-general who concluded the Settlement Agreement with General Motors, support the Settlement Offer and believe it to be a fair and reasonable offer for purposes of settlement. General Motors also supports the settlement offer as fair and reasonable, although in its view plaintiffs and class members are not entitled to any recovery in this litigation.

Inquiries

If you have any questions regarding this notice, you may address them to the persons listed below without any charge to you.

H. Stuart Cunningham
Clerk of the United States District Court
For the Northern District of Illinois,
219 South Dearborn Street
Chicago, Illinois 60604

Charles A. "Pat" Boyle
Scheele, Serkland & Boyle, Ltd.
77 West Washington Street
Chicago, Illinois 60602
(312) 368-1060
(Attorney for Plaintiffs Objecting to Settlement)

Donald G. Mulack
Special Assistant Attorney General
of Illinois
c/o Michael A. Benedetto, Jr.
228 North LaSalle Street
Chicago, Illinois 60601
(312) 793-3444 or 3446
(Attorney for Plaintiffs Approving of Settlement)

You may also wish to consult with any attorney of your own choosing.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS
By .....
H. Stuart Cunningham
Clerk of the Court

Dated: July 5, 1979.

EXHIBIT I

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION
(Received July 31, 1979, Charles A. Boyle)

Name of Presiding Judge, Honorable Frank J. McGarr
Cause No. MDL Docket No. 308
Date 7/27/79

Title of Cause
IN RE: GENERAL MOTORS CORPORATION ENGINE INTERCHANGE LITIGATION

Brief Statement of Motion
EMERGENCY MOTION OF DEFENDANT GENERAL MOTORS CORPORATION FOR ORDER APPROVING REVISED NOTICE OF OFFER TO SETTLE CLAIMS

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).

Names and Addresses of moving counsel

Thomas A. Gottschalk, Stephen C. Neal, James D. Adducci
Kirkland & Ellis 200 East Randolph Drive, Chicago, Illinois 60601

Representing
General Motors Corporation

Names and Addresses of other counsel entitled to notice and names of parties they represent
See Attached List

Docketed July 27, 1979

Reserve space below for notations by minutes clerk

Emergency motion of defendant General Motors Corporation for order approving revised notice of offer to settle claims is heard. Revised notice of offer to settle claims is approved.

Hand this memorandum to the Clerk.
Counsel will not rise to address the Court until motion has been called.

McGarr, J.

No. 79-176

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

BETTY OSWALD, on her own behalf and on behalf of others similarly situated, and PHIL MILLER and EILEEN MILLER, on their own behalf and on behalf of others similarly situated and SKOKIE CENTRAL TRADITIONAL CHURCH,

Petitioners,

vs.

GENERAL MOTORS CORPORATION, *et. al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit

RESPONDENT GENERAL MOTORS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

THOMAS A. GOTTSCHALK
STEPHEN C. NEAL
JAMES D. ADDUCCI
Kirkland & Ellis
200 East Randolph Drive
Chicago, Illinois 60601

Of Counsel:
OTIS M. SMITH
MICHAEL J. BASFORD
LOUIS H. LINDEMAN, JR.
General Motors Corporation
3044 West Grand Boulevard
Detroit, Michigan 48202

Pandick Press Midwest, Chicago • 454-0900

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No. 79-176

IN THE

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BETTY OSWALD, on her own behalf and on behalf of others similarly situated, and PHIL MILLER and EILEEN MILLER, on their own behalf and on behalf of others similarly situated and SKOKIE CENTRAL TRADITIONAL CHURCH,

Petitioners,

vs.

GENERAL MOTORS CORPORATION, *et. al.,*

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The Seventh Circuit

RESPONDENT GENERAL MOTORS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

General Motors opposes petitioners' application for a writ of certiorari because it raises issues which have not yet been considered by the court of appeals and which are neither important nor unsettled.

COUNTER-STATEMENT OF THE CASE

Commencing in March 1977, over 300 lawsuits were filed against General Motors claiming that its interdivisional usage of engines and other components in 1977 Buicks, Pontiacs and Oldsmobiles was unlawful. The vast majority of these cases were individual and purported class actions filed in various state courts, including actions brought by many state attorneys general on behalf of their states' consumers.

Twelve individual and purported class actions were brought in federal courts alleging that the use in 1977 Oldsmobiles of V-8 engines produced in General Motors plants operated by its Chevrolet Motor Division constituted a violation of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, *et seq.* These cases were consolidated in the Northern District of Illinois for pretrial purposes pursuant to 28 U.S.C. § 1407. Over objection, that court certified a nationwide class of 1977 Oldsmobile purchasers solely on the issue of liability under the Magnuson-Moss Warranty Act. In two of the federal actions, the attorneys general of Illinois and Alabama represented consumer plaintiffs.[1]

On December 19, 1977, after lengthy negotiations, General Motors and the attorneys general of 44 states[2] (including Illinois and Alabama) announced a settlement agreement whereby each person who purchased prior to April 11, 1977,[3] a new 1977 Buick, Pontiac or Oldsmobile equipped with a

[1] The Illinois attorney general filed the first Magnuson-Moss action and the only such action to have the requisite 100 named plaintiffs.

[2] Since that time the attorneys general of four additional states have consented to the settlement terms for their consumers.

[3] This date was chosen because the extensive publicity given to this litigation and notices placed in dealer showrooms by General Motors regarding engine sources beginning in March 1977 placed pre-April 11th purchasers in a significantly different factual posture than later purchasers.

Chevrolet-produced V-8 engine would be offered $200 and, if eligible, a transferable three-year mechanical insurance certificate covering the engine and other power train components in their 1977 General Motors car. In return for this consideration, each person accepting the offer was to release his claims relating to the manufacturing source and use of components in his 1977 General Motors car.[4] The release specifically did not bar any claims for defects in any components. In return for General Motors' agreement to make this offer, the attorneys general terminated their litigation.

The agreement with the attorneys general required the offer to be communicated as soon as practicable, subject to obtaining any necessary court permission. Because of the pending federal class action and pursuant to *prior* district court request,[5] it was necessary to obtain district court permission to communicate the offer to eligible Oldsmobile purchasers who were members of the federal class. Local Civil Rule 22, N.D. Ill. Accordingly, on December 19, 1977, the attorneys general and General Motors submitted the offer to the district court for approval of its communication to eligible Oldsmobile purchasers. They further suggested that the offer be considered as a basis for settling and dismissing the Magnuson-Moss claims of

[4] The practice of using various sources to supply components for automobile manufacture is common to the automobile industry and has been engaged in by General Motors and other automobile manufacturers for many years. Thus the release of claims encompasses claims relating to the manufacturing source and use of the various components, including engines, used in 1977 General Motors cars. The release appears in Petitioners Supplemental Appendix at 93a and its precise scope and effect are controlled by the language thereof.

[5] The attorneys general's negotiations were known to private plaintiffs' counsel in the federal class action *before* the settlement was reached. The district court encouraged the negotiations to continue with the express understanding that any claims affecting the class members' claims would first have to be reviewed by that court before it was communicated.

all eligible class members.[6] Private plaintiffs' counsel (including petitioners' counsel) expressed their desire to evaluate the settlement offer as a basis for compromise of the federal class action and requested and received an opportunity to conduct discovery regarding the adequacy of the offer.

In January 1978, after the initial period for discovery into the merits of the offer was concluded, *all* plaintiffs' counsel concurred that the offer provided a promising basis for the settlement of eligible class members' claims. *See,* Transcript of Pretrial Proceedings 2/1/78 and 2/28/78. *All* plaintiffs' counsel endorsed notifying class members of the proposed settlement and scheduling a hearing on its fairness. *Id.* Counsel for petitioners actually urged General Motors to extend the offer to include class members who purchased their Oldsmobiles after April 10, 1977. Transcript of Pretrial Proceedings, 2/15/78 at 30-32. On March 16, 1978, the district court sent all class members a notice informing them that a class had been certified and advising them of their right to opt-out of the class and thereby avoid the binding impact of any further proceedings in the litigation. The notice also informed class members eligible to receive the settlement offer of its terms and that a hearing on its fairness was scheduled at which they could appear to object to the settlement if they remained in the litigation. No objections to the offer as a basis for settlement were expressed by plaintiffs' counsel prior to notifying class members of it.

On May 1, 1978 the hearing into the fairness of the proposed settlement commenced. Of the 66,872 class members to whom the settlement offer was directed only fifteen came forward to object to its fairness. Three of the twelve private

[6] In the federal litigation, 66,872 class members were eligible for the offer agreed to with the attorneys general. The agreement with the attorneys general included consideration valued at over 26 million dollars for the settlement of the claims of those eligible consumers who were also members of the federal class.

plaintiffs' counsel objected to the settlement, while six affirmatively supported it as reasonable. During the hearing, which encompassed twelve days over a three week period, the objectors to the settlement presented their evidence regarding their perception of the value of the settlement. After the hearing, the district court found the settlement to be a fair and reasonable basis for settling the claims of pre-April 11, 1977 Oldsmobile purchasers who were in the class and elected to receive the offer. Among the reasons given by the district court in its findings of fact and conclusions of law for approving the settlement was that the evidence regarding the comparability of the engines in question persuaded it that "the settlement falls well within the parameters of reasonableness and fairness." Petitioners Appendix at 71.

The petitioners appealed the finding of fairness and reasonableness to the Seventh Circuit Court of Appeals, which accepted the appeal under the collateral order doctrine. The court of appeals reversed the district court's approval of the settlement on two grounds. First, after reviewing the settlement hearing record, the court concluded that the district court abused its discretion in approving the settlement because (a) the fairness of the settlement was not established by "clear and convincing evidence," and (b) the district court did not allow discovery into the mental processes of the settlement negotiators. Second, the court of appeals struck down the proposed settlement because it required the dismissal with prejudice of the federal claims of all eligible persons who had elected to be bound by the class action, including those who thereafter were dissatisfied with the settlement.[7] Contrary to petitioners' assertions, the court of appeals did not find that the terms of the settlement offer were unfair.

The court of appeals issued directions on remand which recommended that the district court consider permitting the

[7] General Motors has filed a Petition for Certiorari, No. 79-179, seeking review of these aspects of the court of appeals' decision.

communication of the settlement offer to eligible class members on an individual basis, without using the settlement as a mandatory compromise of the class action under Rule 23(e). Such a course would allow class members to make their own decision as to whether they wished to accept the offer or to continue as part of the federal class litigation. This procedure also obviated the need for a second evidentiary hearing, and related discovery, pursuant to Rule 23(e).[8] In permitting the offer to be communicated, the court of appeals stressed that the district court should concentrate on providing an accurate and complete notice communicating the offer. 594 F.2d at 1139-40. That court gave explicit direction regarding the subjects to be considered in the notice itself, but expressly left to the district court's discretion whether a statement of the objectors' position should be included with the offer to settle claims. 594 F.2d at 1140. Petitioners unsuccessfully sought rehearing by the court of appeals of its "directions on remand." It is that portion of that court's decision which they desire the Court to review by certiorari. Requests by the petitioners to the court of appeals and Justice Stevens to stay issuance of the mandate were also unsuccessful.

Consistent with the court of appeals' direction and recommendation, General Motors moved in the district court for an order allowing communication of the settlement offer on an individual basis. A proposed form of notice communicating the offer was also submitted. The district court gave all parties full opportunity to comment orally and in writing to the notice. Two lengthy hearings were conducted on June 14 and July 5 regarding the notice. A final form of notice was approved on July 5.

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[8] In recommending that the offer be communicated individually without a further Rule 23(e) hearing, the court was fully aware that the offer was negotiated for, and the release comprehended, claims regarding the manufacturing source of all components in 1977 Oldsmobiles and not just V-8 engines which were the subject of the federal class litigation. 594 F.2d at 1116.

During the two hearings, the district court, which had extensive familiarity with the settlement from the prior hearings, stated its view that the consideration being offered is "reasonably compensatory" and not merely "nominal." Petitioners Supplemental Appendix at 73a. That court also noted its desire to follow the court of appeals' recommendation that the offer be communicated on an individual basis. In keeping with the court of appeals' view that the neutrality, accuracy, and sufficiency of the disclosure were of primary importance, the district court declined to accept petitioners' urging that it embroil the proceedings in unspecified discovery and evidentiary hearings regarding the "value" of recently asserted non-engine component "substitution" claims which had *not* been certified for federal class action treatment and which were not even pending before the court. However, the court did insist that the notice clearly inform class members that such other claims were being released by acceptance of the offer and directed that additional language and emphasis regarding this fact be added to the notice to insure its accuracy and completeness.

The district court also permitted expressions of views both by petitioners and by the proponents of the settlement to be included in the body of the notice itself. The notice, as approved, also referred class members to one of petitioners' counsel in the event further information or comment was desired. The district court exercised its discretion not to permit petitioners to send a separate letter to class members condemning the settlement and optimistically appraising the prospects for speculatively large recoveries for those class members who reject the offer.

On July 23, 1979, petitioners filed a notice of appeal and petition for mandamus in the Seventh Circuit Court of Appeals challenging the district court's order of July 5 approving the form of notice and allowing it to be sent out. On the following day, they filed motions to stay communication of the settlement

offer pending appeal before the district court and the court of appeals. The district court denied the motion for stay that same day. On July 26, a panel of the court of appeals stayed transmittal of the settlement offer until two additional sentences suggested by it were added to the notice. On July 27, the district court inserted the two sentences which (1) further explained the effects of accepting the offer and (2) re-emphasized that the release would include specified claims in addition to the claims pending before the district court. The notice has now been mailed to eligible purchasers.

ARGUMENT

Petitioners' application for a writ of certiorari is inappropriate at this time and otherwise fails to meet the standards for granting the writ.[9] The first two issues raised by the petition (regarding free speech and due process) are currently before the Court of Appeals for the Seventh Circuit on petitioners' interlocutory appeal and alternative petition for a writ of mandamus challenging the district court's approval of communication of the settlement offer. Those issues have never been passed upon by the court of appeals in this case.

In addition, those issues and the third issue raised in the petition—which questions the propriety under Rule 23(e) of a non-mandatory individual offer of settlement—question proper discretionary rulings made by the district court in accordance with the court of appeals' mandate. Petitioners' position on each issue is frivolous and rests on the erroneous notion that they alone are appointed to be the exclusive representatives of the class members, even to the point of frustrating the opportunity of class members to consider for themselves a substantial settlement offer negotiated on their behalf. The discretionary rulings made by the district court do not raise constitutional considerations nor do they conflict with any principal of law established by rule, precedent, or otherwise. Thus, the petition presents no matters worthy of the Court's review and it should be denied.

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[9] The issues raised by petitioners are as follows: (1) communication of the settlement offer to individual class members under court supervision will deny them adequate representation of counsel, and thereby, due process of law; (2) refusal to allow petitioners' counsel to communicate with class members through a particular form of communication violates the first amendment; and (3) permitting a settlement offer to go out to individual class members without a Rule 23(e) hearing is improper.

I.

THE FIRST TWO GROUNDS FOR CERTIORARI ARE PREMATURE AND NOT PROPER SUBJECTS FOR REVIEW BY THE COURT BECAUSE THEY HAVE NOT BEEN PASSED UPON BY THE COURT OF APPEALS.

Petitioners' first contention is that communication of the settlement offer to individual class members has deprived them of adequate representation of counsel and, thereby, of due process of law. Petitioners' second contention is that the district court's refusal to allow their counsel to communicate their disapproval of the settlement offer to class members in a separate letter, rather than in the notice itself, violated the first and fifth amendments to the constitution. Neither issue has been passed upon by the court of appeals and hence both are inappropriate for review by the Court at this time. It is well-settled that the Court will ordinarily not review questions not presented or passed upon by the court below. *E.g., United States* v. *Ortiz,* 422 U.S. 891 (1975); *Tacon* v. *Arizona,* 410 U.S. 351 (1973).

Petitioners are currently pursuing these two issues in the court of appeals by way of an interlocutory appeal and a petition for mandamus.[10] If the appellate court rejects petitioners' arguments, later review by the Court, with the benefit of the court of appeals' reasoning on this issue, will be available. As Justice Burton has stated: "The constitutional issue which is the subject of the appeal deserves for its solution all of the wisdom that our judicial process makes available. The need for soundness in the result outweighs the need for speed in reaching

[10] Portions of petitioners' court of appeals brief and petition for mandamus showing the issues sought to be raised there are appended to this brief. These issues are being prematurely raised before the court of appeals, as well as the Supreme Court, because there has been no final appealable order entered by the district court.

it." *Youngstown Sheet & Tube Company* v. *Sawyer,* 343 U.S. 937, 938 (1952) (dissenting from grant of certiorari).

It is especially egregious for petitioners to attempt to simultaneously obtain *de novo* review of the same issues before the court of appeals and the Court. The orderly administration of the federal court system dictates that issues be reviewed by a lower court before they are brought before the Court. Since this was not done as to two of the three issues raised by the petitioners, a writ of certiorari on those issues should be denied.

II.

THE ISSUES WHICH PETITIONERS SEEK TO RAISE ARE WITHOUT MERIT AND THEY DO NOT INVOLVE ANY CONSIDERATION THAT WOULD JUSTIFY GRANTING CERTIORARI.

The three issues on which petitioners base their petition for certiorari do not involve any consideration that would warrant issuance of the writ. Supreme Court Rule 19 states that considerations such as the following govern review by certiorari:

> Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; . . .; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

None of these reasons is presented by the instant petition. Indeed, petitioners do not even articulate these or any similar reasons or attempt to demonstrate that the issues which they raise invoke them.

A.

The District Court Did Not Violate Class Members' Due Process Rights By Permitting Communication Of A Substantial Settlement Offer To Individual Class Members.

The settlement offer was negotiated for consumers by the several state attorneys general who had themselves sued (or were threatening to sue) General Motors over the manufacturing sources of components, including engines and other power train components, used in 1977 General Motors cars. The consideration for consumers exceeds the manufacturer's suggested retail price for a V-8 engine option and offers comprehensive mechanical insurance coverage for all power train components (including transmissions). The release of claims covers only 1977 GM cars and does not extend to claims relating to alleged defects in materials or workmanship of any component.

It was necessary to consult the federal district court regarding the communication of the attorneys general offer because that court had certified an engine source claim on behalf of 1977 Oldsmobile purchasers for class action treatment. This particular claim was within the scope of the attorneys general litigation and settlement. Under Local Civil Rule 22, permission of the district court is required before class members may receive an offer to settle claims even where the offer arises out of related litigation pending in other courts and is being extended on an individual basis.

Ignoring the roles of the attorneys general, the other private counsel, and the court, in protecting class members'

interests[11] the petitioners assert that the communication of the attorneys general offer to consumers should have been arrested solely because of their desire to litigate the "value" of claims *not* presented by their complaints, *not* otherwise pending before the court, and *not* certified as class claims. Rather than raising any genuine due process considerations, petitioners' tactics reflect an effort to frustrate the ability of the judicial process to resolve multiple complex litigation on a basis that may be satisfactory and acceptable to the persons whose claims are being litigated. Petitioners' rights themselves are wholly unaffected by the communication of the offer since petitioners currently are free to reject it and to continue to prosecute their claims.[12]

The due process rights of class members are also protected by the notice given by the district court. It is a neutral notice which does not express any judicial opinion as to the adequacy of the offer. Instead, the notice allows each class member to make his own election based on full and sufficient information concerning the offer to settle, the effects of settling, and the available avenues for pursuing his claims if he does not settle. Based on that disclosure, plus the class members' own assess-

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[11] As noted above, the majority of private plaintiffs counsel in the federal litigation investigated the merits of the attorneys general offer and supported it as a fair and reasonable basis of settlement. At the fairness hearing, the district court itself heard extensive evidence presented by petitioners even on "transmission" issues and was persuaded of the settlement's reasonableness.

[12] Petitioners' insistence on ascertaining the "value" of claims not presented by their complaints is nothing more than an attempt to expand the litigation and to require the equivalent of a trial on the merits before a settlement offer may be communicated. The district court was satisfied that the consideration being offered was substantial for the class claim pending before it and assured that the class notice informed class members of the existence of other potential claims, including where they were being litigated, and the effect of accepting the settlement offer on those other claims.

ment of his particular circumstances, including the performance of his car, each class member is in a position to make an informed choice as to whether or not to accept the offer.[13]

If anything offends basic principles of fairness, it is petitioners' notion that the unacceptability of the settlement offer to them should preclude its consideration and acceptance by others who may prefer its benefits.

> Indeed, if anything strikes this Court as unfair or unreasonable it is the paternalistic notion that it is in the best interests of competent adults that they be deprived of their right to receive and freely choose whether to accept or reject defendants' compromise offer.

Rodgers v. *United States Steel Corporation,* 70 F.R.D. 639, 644 (W.D. Pa. 1976.), *appeal dismissed* 541 F.2d 365 (3d Cir. 1976).

Due process is respected, and not offended, when the judicial process leaves to the party in interest, rather than his co-party or a minority of class counsel, whether to accept a settlement or to continue the pursuit of his claims. Where, as here, that decision is made following full notice of the status of the litigation, its scope, and the possible future outcomes of the litigation, due process considerations, such as they may exist, have been fully satisfied.

Petitioners have cited no authority in support of the proposition that due process rights of class members have been violated by the procedures adopted and implemented to protect those class members' interests in this case. The first issue raised by the petition is, for all the reasons stated, not a proper basis for a grant of certiorari.

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[13] Petitioners' assertion that their counsel is unable to form an opinion as to whether to recommend acceptance of the settlement offer (Petition For Certiorari at 6) is specious. In fact, petitioners have expressed their view that the settlement should be rejected and, as discussed next, that they should have been allowed additional means of communicating their opinion to other class members.

B.

By Including A Statement Of Objectors' Views In The Notice Itself, In Lieu Of A Separate Letter, The District Court Did Not Violate Any Constitutional Rights.

Petitioners' second contention is that the district court's refusal to allow their counsel to communicate their disapproval of the settlement offer to class members in a separate letter, rather than in the notice itself, violated the first and fifth amendments to the Constitution. The district court allowed petitioners to express their opposition to the settlement in the body of the notice itself. The argument that the Constitution required a separate letter to be sent is wholly unfounded.

The court of appeals held that "[w]hether the offer to settle should contain a statement by the plaintiff-objectors of their opinion of the adequacy of the settlement package in order to make the communication a full and complete disclosure is a matter left to the trial court's discretion." 594 F.2d at 1140. In the exercise of its discretion, the district court decided that a fair and neutral statement from that court, which included an expression of views by the objectors and proponents, would do more to inform class members than a confusing "war of letters." Petitioners Supplemental Appendix at 20a-21a. To so conclude was an appropriate exercise of the district court's discretion, which in no way precluded the objectors' viewpoint from reaching class members.[14]

Petitioners' claim that they or their counsel are imbued with a first amendment right to send a separate letter to class members is erroneous. The need for and propriety of judicial

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[14] Respondent does not concede that any class action plaintiff has a first amendment or any other right to communicate his views to class members separate from the views of other class plaintiffs. Nor does such a right exist independent of prior review and control by the federal court upon whose authority the class has been formed and the claimed right of representation exists.

control over communications with class members regarding the class action is firmly established. The court of appeals so recognized. 594 F.2d at 1138, n.57 (citing *inter alia Manual For Complex Litigation,* § 1.41, and Local Civil Rule 22 of the Northern District Court of Illinois). The potential for abuse and confusion affords considerable justification for the principle that those persons accorded class representative status by the district court must accept its supervision in their communications with class members.

The situation presented here is totally unlike that found in *Chicago Council of Lawyers* v. *Bauer,* 522 F.2d 242 (7th Cir. 1975), *cert. denied* 427 U.S. 912 (1976). That action involved a local rule restricting lawyers' ability to comment publicly on pending litigation. In contrast, petitioners here have been allowed to express their views to the class in the notice. They have been permitted, also in the notice itself, to identify one of their counsel in case class members wish to contact him. Moreover, without commenting on the propriety of his conduct, it should be noted that petitioners' counsel has not been restrained from denouncing the settlement offer and its mailing in press interviews. *See, e.g., Chicago Tribune,* July 27, 1979, Sec. 1, p. 6. Under these circumstances, no first amendment rights have been violated and, indeed, no significant free speech questions are even suggested.[15]

Neither have class members been denied any fifth amendment right to effective assistance of counsel, to the extent it may exist in a civil case, by the district court's exercise of control over the forms of communication between class members and

[15] The decision in *Rodgers* v. *United States Steel Corporation,* 536 F.2d 1001 (3rd Cir. 1976), similarly affords no support to petitioners' novel assertion. That case involved a challenge to a protective order absolutely barring plaintiffs' counsel from mentioning specific information to class members. No such bar has been imposed in this case.

petitioners' counsel. The rights of class members have been adequately safeguarded by the full notice required by the court of appeals which enables them to decide whether or not to accept the offer. Moreover, petitioners constitute a minority of the class representatives. Petitioners' claim to advise class members is in no way superior to that of the majority of the private plaintiffs and counsel who support the settlement or of the attorneys general who, under state law, are authorized to sue on their citizens' behalf.

Ultimately, it is the courts which serve as the guardians of the class interests. The district court has performed this role by permitting class members to decide for themselves whether to accept a settlement offer which is described in an accurate, complete, and neutral notice that includes the respective positions of the settlement's proponents and objectors. By denying petitioners one particular form of communication for expressing their views, but allowing their views to be expressed in other forms, the district court acted well within its permissible discretion.

Thus petitioners' second contention also cannot serve as a legitimate basis for the grant of a writ of certiorari.

C.

A Class Action Court Has Discretion To Permit Communication Of Individual Settlement Offers To Class Members Without Approving The Settlement Terms As A Mandatory Compromise of The Class Action Under Rule 23(e).

Under the court of appeals' decision, an offer to settle claims negotiated in other litigation may be communicated to members of a federal class on a non-mandatory, individual basis, subject to the district court's approval. Since the class action litigation continues in such circumstances, Rule 23(e) has no application, and an evidentiary hearing to determine

whether the offer would also be a fair and adequate basis for compromising and resolving all class members' claims is not required. Nonetheless, petitioners here, who have chosen to continue to pursue the class litigation, protest that a Rule 23(e) hearing was an immutable requirement before class members could even consider the settlement offer.[16]

The allowance of a settlement offer to be extended to individual members of a class without Rule 23(e) approval, provided that the settlement is not used as a basis for dismissal of the class action itself, is supported by a great deal of precedent. *See Weight Watchers of Philadelphia, Inc.* v. *Weight Watchers International, Inc.*, 455 F.2d 770, 773 (2d Cir. 1972); *Vernon J. Rockler & Company* v. *Minneapolis Shareholders Company*, 425 F. Supp. 145, 149-50 (D. Minn. 1977); *Chrapliwy* v. *Uniroyal, Inc.*, 71 F.R.D. 461, 464 (N.D. Ind. 1976); *Rodgers* v. *United States Steel Corporation*, 70 F.R.D. 639, 642 (W.D. Pa. 1976), *appeal dismissed* 541 F.2d 365 (3d Cir. 1976); *Dickerson* v. *U.S. Steel Corporation*, 11 EPD ¶ 10,848 (E.D. Pa. 1976); *American Finance System, Inc.* v. *Harlow*, 65 F.R.D. 572, 575-76 (D. Md. 1974); *Korn* v. *Franchard Corporation*, 388 F. Supp. 1326, 1329 n.4 (S.D.N.Y. 1975); *Nesenoff* v. *Muten*, 67 F.R.D. 500, 503 (E.D.N.Y. 1974); *Matarazzo* v. *Friendly Ice Cream Corporation*, 62 F.R.D. 65, 69 (E.D.N.Y. 1974); *Wolf* v. *Barkes*, 348 F.2d 994, 995-96 (2d Cir. 1965), *cert. denied* 382 U.S. 941 (1965). There is no conflict among the circuits on this point and it does not present an important, unsettled question of federal law.

Communication of individual settlement offers to class members ordinarily should be supervised by the courts. *Mata-*

[16] After a twelve day hearing the district court found the settlement to be fair and reasonable as a settlement of the class litigation. Contrary to petitioners' repeated assertion that the court of appeals "disapproved" the settlement, that court held that the settlement was properly communicated on an individual, not a mandatory, basis without the need for further evidentiary hearings.

razzo, supra, 62 F.R.D. at 69 n.4. Court supervision safeguards the class member's free choice, *Korn, supra*, 388 F. Supp. at 1333, and assures that other class members' rights are not prejudiced, *Vernon J. Rockler & Company, supra*, 425 F. Supp. at 150. An adequate notice describing the offer and its effects, coupled with an express statement of the court's neutrality, is certainly sufficient to protect the class member from undue influence. *See Chrapliwy, supra*, 71 F.R.D. at 464; *American Finance System, Inc., supra*, 65 F.R.D. at 576. So long as the class action continues and the claims of those rejecting the offer are not extinguished, the settlement does not legally bind or otherwise prejudice their rights. *Weight Watchers of Philadelphia, Inc., supra*, 455 F.2d at 770; *Nesenoff, supra*, 67 F.R.D. at 503; *see Shelton* v. *Pargo, Inc.*, 582 F.2d 1298, 1314-15 (4th Cir. 1978).

These authorities recognize that Rule 23(e) provides for court approval and notice of class action settlements *only* when the class action itself is dismissed or compromised. Rule 23(e) itself provides that: "A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." Thus, offers to settle individual claims do not fall under this rule and do not require court approval. Such offers may be controlled, however, to assure that undue influence is not exerted on the individual receiving the offer. Rule 23(d)(2), Fed. R. Civ. P.; *Chrapliwy, supra*, 71 F.R.D. at 464; Dole, *The Settlement of Class Actions for Damages*, 71 Colum. L. Rev. 971, 995 (1971).

A strict rule precluding individual class members from accepting settlement terms which they regard as favorable would be unwise, as well as contrary to precedent. A number of circumstances may arise in which it is desirable to allow a class member to consider a settlement offer in order to obtain a

prompt resolution of his claims, even though the class action may not be extinguished. See Dole, *supra,* 71 Colum. L. Rev. at 997. For example, the offer may be substantial and represent a meaningful opportunity to resolve class members' claims without further risk or delay. In other cases, the class representatives may be seriously divided over whether the offer should constitute a basis for dismissal of the class claim. In other situations, the offer of settlement may arise out of related and overlapping representative litigation pending in other forums. All of these situations cited are presented by the instant case.

The desirability of permitting individual settlement offers to be communicated is illustrated by the closely analogous decision in *Rodgers* v. *United States Steel Corporation,* 70 F.R.D. 639 (W.D. Pa. 1976), *appeal dismissed* 541 F.2d 365 (3d Cir. 1976). A year after that action was certified as a class action, the defendant sought leave to communicate a settlement offer, including a general release of claims, to members of the plaintiff class pursuant to the terms of an industry-wide consent decree filed in another federal jurisdiction. The *Rodgers* court expressly found Rule 23(e) inapplicable because the offer was not a "settlement of the *Rodgers* class action itself." 70 F.R.D. at 643. Instead, the court found the offer to present a "*meaningful* tender of immediate, litigation-free back pay that does no more than offer its recipient the option of presently accepting it or rejecting it." *Id.* at 644. More fundamentally, the court recognized that a class action should not interpose a barrier to a class member's right freely to choose whether he wishes to accept a meaningful settlement offer. After reviewing and approving the adequacy of the proposed notice, the offer was permitted to be communicated.

This "satisfaction-of-claims approach reduces the burden of representative litigation on the courts." Dole, *supra,* 71 Colum. L. Rev. at 997. It also serves the recognized policy of encouraging settlements. *Patterson* v. *Stovall,* 582 F.2d 108,

112 (7th Cir. 1976); *Weight Watchers of Philadelphia, Inc.,* v. *Weight Watchers International, Inc.,* 455 F.2d 770, 773 (2d Cir. 1972). Since communications are placed under the court's control to prevent undue influence and to assure that other class members' interests will not be prejudiced, the suggested procedure has adequate safeguards to protect against its abuse.

In recommending that this course be followed, the appellate court incorporated all the limitations and safeguards suggested by the many cases approving communication of individual settlement offers. The class action will continue, subject to the risks and uncertainties of litigation, as to those eligible class members who choose to reject the offer.

Petitioners also raise the specter of piecemeal settlements being extended to fragment the class and ultimately to destroy its viability. However, that specter is not present in this case. The settlement offer extended here is part of a comprehensive settlement of related litigation pending elsewhere, for which permission of the federal court was required under its local rules before being extended to Oldsmobile purchasers and which does not effect the viability of the purported class action. In any event, where improper settlements may be threatened, the courts have adequate authority to prevent or redress any real abuses.

Petitioners also attempt to undercut the effect of *Weight Watchers of Philadelphia, Inc., supra,* by pointing out that this decision dealt with pre-certification class members whereas the instant case deals with post-certification class members. This is a distinction without a difference. In fact, individual settlement offers have been authorized without conducting Rule 23(e) approval hearings in at least three post-certification cases. *Chrapliwy* v. *Uniroyal, Inc.,* 71 F.R.D. 461, 464 (N.D. Ind. 1976); *Rodgers* v. *United States Steel Corporation,* 70 F.R.D. 639 (W.D. Pa. 1976), *appeal dismissed* 541 F.2d 365 (3d Cir. 1976); *Dickerson* v. *U.S. Steel Corporation,* 11 EPD ¶10,848

(E.D. Pa. 1976)[17] No policy consideration supports the stark distinction which petitioners attempt to draw between putative and certified class actions. In reviewing settlement offers, federal courts tend to treat putative class actions as though certified from the time of filing. *See Susman* v. *Lincoln American Corporation,* 587 F.2d 866, 869, 870-71 (7th Cir. 1978); *Shelton* v. *Pargo, Inc.,* 582 F.2d 1298 (4th Cir. 1978); *Roper* v. *Consurve, Inc.,* 578 F.2d 1106, 1110 (5th Cir. 1978), *cert. granted* 99 S.Ct. 1421 (1979). In either situation, the court will review the settlement offer to assure that undue influence has not been exercised over the settling class members and that other absent class members' rights have not been prejudiced.[18]

Both precedent and policy weigh heavily against petitioners' request that the Court establish a rule barring the communication of settlement offers to individual class members without first having conducted a Rule 23(e) evidentiary hearing needed in approving mandatory compromises of class actions as fair and reasonable. Thus, petitioners' third contention of error is also without merit.

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[17] See also derivative cases in which post-filing settlement offers have been upheld. *Wolf* v. *Barkes,* 348 F.2d 994 (2d Cir. 1965), *cert. denied* 382 U.S. 941 (1965); *Vernon J. Rockler & Company* v. *Minneapolis Shareholders Company,* 425 F. Supp. 145 (D. Minn. 1977). Many of the standards developed in derivative suits apply equally well to class action settlement procedures. *See generally, Developments in the Law—Class Actions,* 89 Harv. L. Rev. 1318, 1539 (1976).

[18] The commentators likewise draw no distinction between putative and certified classes in discussing court-supervised communication of individual settlement offers. Wright & Miller, *Federal Practice & Procedure, Civil § 1797 (1978 Pocket Part) (p. 47); Dole, supra,* 71 Colum. L. Rev. at 995.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

DATED: September 4, 1979

Respectfully submitted,

THOMAS A. GOTTSCHALK
STEPHEN C. NEAL
JAMES D. ADDUCCI
Kirkland & Ellis
200 East Randolph Drive
Chicago, Illinois 60601

Of Counsel:
OTIS M. SMITH
MICHAEL J. BASFORD
LOUIS H. LINDEMAN, JR.
General Motors Corporation
3044 West Grand Boulevard
Detroit, Michigan 48202

APPENDIX

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 79-1843

IN RE GENERAL MOTORS CORPORATION ENGINE INTERCHANGE LITIGATION

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
Honorable FRANK J. MCGARR, *Judge Presiding.*

BRIEF AND ARGUMENT OF PLAINTIFFS-OBJECTORS BETTY OSWALD, EILEEN MILLER AND PHIL MILLER

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Is the trial court's order of July 5, 1979 reviewable at this time?

2. Did the District Court abuse its discretion and deny class members due process of law by approving communication of the settlement offer without conducting a hearing to determine the value of the transmission claim?

3. Does the District Court's refusal to allow objectors' counsel to communicate with class members explaining and evaluating the offer of settlement violate the First Amendment as a prior restraint on the speech of objectors' counsel?

4. Does the District Court's refusal to allow objectors' counsel to send a letter to class members explaining their objections to and evaluation of the settlement offer deny class members due process of law and violate their First Amendment right to receive full information about their lawsuit?

* * * *

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

BETTY OSWALD, EILEEN MILLER and PHIL MILLER and MICHAEL J. BALOG, on behalf of themselves and all others similarly situated,

Petitioners,

-Vs-

FRANK J. McGARR, U.S. District Judge,

Respondent.

PETITION FOR WRIT OF MANDAMUS

Now comes Betty Oswald, Eileen Miller and Phil Miller and Michael J. Balog, on behalf of themselves and all others similarly situated, petitioners in the above entitled action and pursuant to Rule 21 of the Federal Rules of Appellate Procedure and petition this court to issue a Writ of Mandamus directing the Honorable Frank J. McGarr, Judge of the United States District Court for the Northern District of Illinois, Eastern Division, to vacate the order approving communication of the offer to settle claims in the above-entitled action now pending in that court.

* * * *

ISSUES

1. Did the district court abuse its discretion and deny class members due process of law in approving the communication of a settlement offer in this case which would release claims for

the substitution of component parts other than engines, which the district court stated is not a part of this case.

2. Did the district court abuse its discretion and deny members due process of law in failing to conduct a hearing testing whether the consideration in the subject offer was only "nominal consideration" in view of the court's determination that this case concerns only engine interchanges?

3. Does the district court's refusal to allow petitioners' counsel to communicate with class members explaining the objections to the settlement offer violate the First Amendment as a prior restraint on the speech of petitioners' counsel?

4. Does the district court's refusal to allow petitioners' counsel to communicate with class members explaining the objections to the settlement, thereby preventing counsel from communicating relevant information to class members, deny class members due process of law and violate their First Amendment right to be fully informed about this action?

* * * *